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IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO ANNOTATED

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Compiled Under the Supervision of the
Idaho Code Commission

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TITLES 19 AND 20

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PUBLISHER'S NOTE

Since the publication in 1997 of Replacement Titles 19 and 20, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for Titles 19 and 20 has made it necessary to revise this volume. Accordingly, Replacement Titles 19 and 20 are issued with the approval and under the direction of the Idaho Code Commission.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, court decisions are now being read as they are released by the courts. A consequence of this more current reading of cases, as they are posted on *lexis.com*, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of March 25, 2004. These cases will be printed in the following reports:

Pacific Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Reporter, 3rd Series
United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Additionally, annotations have been taken from the following sources:

American Law Reports, 5th Series, through Volume 113
American Law Reports, Federal Series, through Volume 189
Opinions of Attorney General, 2002-2

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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USER'S GUIDE

To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.

ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

1921	March 5, 1921
1923	March 9, 1923
1925	March 5, 1925
1927	March 3, 1927
1929	March 7, 1929
1931	March 5, 1931
1931 (E.S.)	March 13, 1931
1933	March 1, 1933
1933 (E.S.)	June 22, 1933
1935	March 8, 1935
1935 (1st E.S.)	March 20, 1935
1935 (2nd E.S.)	July 10, 1935
1935 (3rd E.S.)	July 31, 1936
1937	March 6, 1937
1937 (E.S.)	November 30, 1938
1939	March 2, 1939
1941	March 8, 1941
1943	February 28, 1943
1944 (1st E.S.)	March 1, 1944
1944 (2nd E.S.)	March 4, 1944
1945	March 9, 1945
1946 (1st E.S.)	March 7, 1946
1947	March 7, 1947
1949	March 4, 1949
1950 (E.S.)	February 25, 1950
1951	March 12, 1951
1952 (E.S.)	January 16, 1952
1953	March 6, 1953
1955	March 5, 1955

1957	March 16, 1957
1959	March 9, 1959
1961	March 2, 1961
1961 (1st E.S.)	August 4, 1961
1963	March 19, 1963
1964 (E.S.)	August 1, 1964
1965	March 18, 1965
1965 (1st E.S.)	March 25, 1965
1966 (2nd E.S.)	March 5, 1966
1966 (3rd E.S.)	March 17, 1966
1967	March 31, 1967
1967 (1st E.S.)	June 23, 1967
1968 (2nd E.S.)	February 9, 1968
1969	March 27, 1969
1970	March 7, 1970
1971	March 19, 1971
1971 (E.S.)	April 8, 1971
1972	March 25, 1972
1973	March 13, 1973
1974	March 30, 1974
1975	March 22, 1975
1976	March 19, 1976
1977	March 21, 1977
1978	March 18, 1978
1979	March 26, 1979
1980	March 31, 1980
1981	March 27, 1981
1981 (E.S.)	July 21, 1981
1982	March 24, 1982
1983	April 14, 1983
1983 (E.S.)	May 11, 1983
1984	March 31, 1984
1985	March 13, 1985
1986	March 28, 1986
1987	April 1, 1987
1988	March 31, 1988
1989	March 29, 1989
1990	March 30, 1990
1991	March 30, 1991
1992	April 3, 1992
1992 (E.S.)	July 28, 1992
1993	March 27, 1993
1994	April 1, 1994
1995	March 17, 1995
1996	March 15, 1996
1997	March 19, 1997
1998	March 23, 1998
1999	March 19, 1999

2000	April 5, 2000
2001	March 30, 2001
2002	March 15, 2002
2003	May 3, 2003
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TITLE 19

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CHAPTER 1

PRELIMINARY PROVISIONS

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19-101. Legal conviction necessary to punishment. — No person can be punished for a public offense except upon a legal conviction in a court having jurisdiction thereof. [Cr. Prac. 1864, § 5; R.S., R.C., & C.L., § 7350; C.S., § 8616; I.C.A., § 19-101.]

Cross ref. Idaho Criminal Rules, see Court Rules Volume.

Idaho Rules of Evidence, see Court Rules Volume.

Rights of accused in criminal prosecution, Const., Art. 1, § 13.

Cited in: State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957); State v. Brandt, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

ANALYSIS

In general.

Withheld judgment.

In General.

Reading this section together with its companion, § 18-109, it is apparent that the legislature intended that neither death, imprisonment, fine nor removal or disqualification from office be imposed as punishment for a crime without there first being "a legal conviction" of that crime. State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

Withheld Judgment.

For purposes of this section conviction occurs when a verdict or plea of guilty is accepted by the court, and where a verdict or plea of guilty has been accepted by the court but judgment on that plea or verdict has been withheld, this section neither precludes nor authorizes the imposition of criminal punishment, fines and imprisonment, as conditions of that withheld judgment. State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978).

Opinions of Attorney General. A person who is pardoned or who has successfully completed the period of a withheld judgment and had his or her guilty plea or conviction negated or expunged may possess and transact firearms without violating the federal Gun Control Act at 18 U.S.C. §§ 921-928; however, during the probationary period of a withheld judgment and during and after the term which a person serves on probation with a suspended sentence or on parole, such person is a convicted felon for the purposes of the Gun Control Act. OAG 86-16.

19-102. Prosecution by indictment or information — Exceptions. — Every public offense must be prosecuted by indictment, or information, except:

1. Where proceedings are had for the removal of civil officers of the state.
2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace.
3. Offenses tried in justices, and probate courts. [Cr. Prac. 1864, § 6; R.S., § 7351; am. 1899, p. 125; reen. R.C. & C.L., § 7351; C.S., § 8617; I.C.A., § 19-102.]

Compiler's notes. The justices and probate courts were abolished by S.L. 1969, ch.

100, § 1 which provided that wherever the words probate court or justice court appear

they shall mean the district court, or the magistrate's division of the district court, as the case may be.

Cross ref. Impeachment of officers, §§ 19-4001 — 19-4016.

Prosecution by indictment, § 19-1401 et seq.

Prosecution by information, §§ 19-1301 — 19-1309.

Removal of civil officers, §§ 19-4101 — 19-4114.

Similar constitutional provision, Const., Art. 1, § 8.

Cited in: Pittam v. Maynard, 103 Idaho 177, 646 P.2d 419 (1982).

Collateral References. Power of court to make or permit amendment of indictment

with respect to allegations as to place. 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 A.L.R.3d 1358.

Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 A.L.R.3d 968.

Necessity of alleging in indictment or information limitation — tolling facts. 52 A.L.R.3d 922.

Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney. 66 A.L.R.3d 732.

19-103. Criminal action defined. — The proceedings by which a party charged with a public offense is accused and brought to trial and punishment is known as a criminal action. [Cr. Prac. 1864, § 7; R.S., R.C., & C.L., § 7352; C.S., § 8618; I.C.A., § 19-103.]

Cited in: State v. Orr, 53 Idaho 452, 24 P.2d 679 (1933); City of Sandpoint v. Butigan, 91 Idaho 855, 433 P.2d 125 (1967).

19-104. Parties to criminal actions. — A criminal action is prosecuted in the name of the state of Idaho, as a party, against the person charged with the offense. [Cr. Prac. 1864, § 8; R.S., R.C., & C.L., § 7353; C.S., § 8619; I.C.A., § 19-104.]

Cited in: State v. Orr, 53 Idaho 452, 24 P.2d 680 (1933).

ANALYSIS

Constitutionality.
In general.

Constitutionality.

There is no violation of the constitution in prosecution of person accused of crime where prosecution is had in the name of "the state of

Idaho" instead of in the name of the people of the state of Idaho. State v. Lockhart, 18 Idaho 730, 111 P. 853 (1910).

In General.

The violation of a state statute committed within the limits of a city cannot be prosecuted in the name of such city. City of Sandpoint v. Butigan, 91 Idaho 855, 433 P.2d 125 (1967).

19-105. Defendant. — The party prosecuted in a criminal action is designated in this code as the defendant. [Cr. Prac. 1864, § 9; R.S., R.C., & C.L., § 7354; C.S., § 8620; I.C.A., § 19-105.]

Cited in: State v. Orr, 53 Idaho 453, 24 P.2d 680 (1933).

19-106. Rights of defendant. — In a criminal action the defendant is entitled:

1. To a speedy and public trial.
2. To be allowed counsel as in civil actions, or to appear and defend in

person and with counsel. [Cr. Prac. 1864, § 10, first two subds.; R.S., R.C., & C.L., § 7355; C.S., § 8621; I.C.A., § 19-106.]

Cross ref. Constitutional guaranty, Const., Art. 1, § 13.

Defendant entitled to discharge when indictment is not found against him at next term of court, or when not brought to trial at next term, § 19-3501.

Cited in: State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945); State v. Wilbanks, 95 Idaho 346, 509 P.2d 331 (1973); State v. Stuart, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

ANALYSIS

Parole.

—Effect of denial.

Right to counsel.

Right to public trial.

Speedy trial.

Parole.

—Effect of Denial.

Information that an inmate is a suspect in another, as yet uncharged, crime is relevant to parole decision and a rule that a denial of parole following the commission's receipt of such information will constitute an "arrest" for the uncharged offense would hamper the functions of both the Commission on Pardons and Parole and law enforcement authorities as such; therefore, the denial of parole to defendant was not the equivalent of an arrest for the sexual offense that remained under investigation and his continued incarceration was for the burglary conviction and it was not pretrial detention for the uncharged sex offense, and defendant's sixth amendment rights were not implicated until formal charges were filed. State v. Brashier, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Right to Counsel.

Lack of counsel at time of arraignment is not ground for setting aside continuance for term, in absence of showing that defendant demanded and was refused right to have counsel present. State v. Athens, 36 Idaho 224, 210 P. 133 (1922).

Right to Public Trial.

Defendant in a prosecution for crime of assault with intent to commit rape was not deprived of public trial when court in its discretion required all spectators and all persons, except those necessarily in attendance, to retire from court room during trial. State v. Johnson, 26 Idaho 69, 144 P. 784 (1914).

Ex parte proceeding conducted by trial court in chambers upon motion of special prosecutor without giving defendant notice or

opportunity to attend in which decision to shackle defendant during trial was made violated defendant's rights to a public trial and to be present at all significant stages of a criminal action. State v. Crawford, 99 Idaho 87, 577 P.2d 1135 (1978).

Speedy Trial.

Where complaint for issuing fraudulent checks was filed March 6, 1964, a hold order was sent to the state penitentiary, where defendant had been returned for violation of probation, on July 24, 1964, defendant requested a speedy trial on September 29, 1964, and on December 18, 1964, he was delivered to the county sheriff and arrested February 24, 1965, a preliminary hearing was held March 4, 1965, and defendant petitioned for a writ of habeas corpus on May 4, 1965, defendant was not accorded a speedy trial within the guarantees of this section. Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966).

Any delay caused by the defendant's resistance to extradition is tolled for the purposes of a speedy trial. Balla v. State, 97 Idaho 378, 544 P.2d 1148 (1976).

The right to speedy trial is guaranteed by Const., Art. I, § 13, and this section which merely restates the protection granted by Const., Art. I, § 13. Both are comparable to that protection provided by the U.S. Const., Amends. 6 and 14. State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981).

The action of the legislature in repealing former § 1-706, governing terms of court, and the action of the Supreme Court in promulgating I.R.C.P. 77(a), abolishing terms of court, precludes determining the right to a speedy trial by reference to terms of court for cases filed after the effective date (March 31, 1975) of the repeal of § 1-706. State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981).

Where there was a seven-and-one-half-month delay between the date the criminal complaint was issued and the date of trial, but there was no indication that prosecution engaged in dilatory tactics and delay caused by improper jury selection followed from defendant's motion to dismiss, and where no prejudice was shown, defendant's right to speedy trial was not violated. State v. Carter, 103 Idaho 917, 655 P.2d 434 (1981).

Where the interval between the filing of information and the defendant's filing of his motion to dismiss for lack of speedy trial was approximately eight months and was sufficient to trigger an inquiry into whether a speedy trial has been denied the eight-month period is not in itself so excessive as to out-

weigh other balancing factors. *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

In determining whether there has been a denial of a speedy trial, where the defendant was arrested for unknown crimes in another county, subsequently left the state and did not notify his own attorney or the prosecutor of his departure or whereabouts, the state met its burden by showing that the prosecution made a reasonable endeavor to locate the defendant, to take action to procure his return, and to continue the prosecution as soon as he was located, and the reasons for the delay in this case weigh more heavily against the defendant and are more properly attributable to him than to the state. *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

Where the defendant was not subjected to oppressive pretrial incarceration nor was there any contention that his ability to present his defense was impeded by a delay, he has not alleged that he was prejudiced by the delay in any way and the court gave no weight to the factor of prejudice. *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

Defendant, who agreed to plead guilty to a lesser offense midway through his trial that had been twice vacated and occurred eleven months after his being charged with rape, did not have his right to a speedy trial denied because his valid guilty plea, voluntarily and understandingly given, waived both the right to a speedy trial as well as the consideration of the denial of such right as fundamental error which could be raised for the first time on appeal. *State v. Garcia*, 126 Idaho 836, 892 P.2d 903 (Ct. App. 1995).

This section simply restates the speedy trial protection granted by Const., Art. I, § 13 and therefore affords no additional safeguard to that already provided by Const., Art. I, § 13. *State v. Brashier*, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

19-107. Second prosecution prohibited. — No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted. [I.C., § 19-107, as added by 1972, ch. 336, § 2, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 11; R.S., R.C., & C.L., § 7356; C.S., § 8622; I.C.A., § 19-107, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 2, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 1 of S.L. 1972, ch. 336, is compiled

Collateral References. 21A Am. Jur. 2d, Criminal Law, §§ 1021 — 1029, 1032 — 1044, 1065.

Duty to advise accused as to right to assistance of counsel. 3 A.L.R.2d 1003.

Waiver or loss of accused's right to speedy trial. 57 A.L.R.2d 302.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial. 85 A.L.R.2d 980.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 A.L.R.2d 747.

Accused's right to assistance of counsel at or prior to arraignment. 5 A.L.R.3d 1269.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 A.L.R.3d 1360.

Attorney's refusal to accept appointment to defend indigent or to proceed in such defense, as contempt. 36 A.L.R.3d 1221.

Determination of indigency of accused entitling him to appointment of counsel. 51 A.L.R.3d 1108.

Accused's right to choose particular counsel appointed to assist him. 66 A.L.R.3d 996.

Accused's right to represent himself in state criminal proceeding — modern state cases. 98 A.L.R.3d 13.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information. 39 A.L.R.4th 899.

Relief available for violation of right to counsel at sentencing in state criminal trial. 65 A.L.R.4th 183.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel. 19 A.L.R.5th 351.

Adequacy of defense counsel's representation of criminal client—issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case. 80 A.L.R.5th 55.

as title 18 and § 3 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228.

Cross ref. Twice in jeopardy prohibited, Const., Art. 1, § 13.

ANALYSIS

Former acquittal.
Former jeopardy.

Former Acquittal.

No judgment of conviction can be sustained unless jury has given adverse finding on plea of formal acquittal, when such plea is interposed. *State v. Gutke*, 25 Idaho 737, 139 P. 346 (1914).

Former Jeopardy.

A defendant, pleading former jeopardy to a charge of second degree murder after pleading guilty to a charge of assault and battery on decedent, was not prejudiced by failure of court to dismiss assault and battery charge since the felony charge would lie as against a plea of former jeopardy after plea of guilty on misdemeanor as well as after sentence. *State v. Randolph*, 61 Idaho 456, 102 P.2d 913 (1940).

One charged with an included offense as well as a higher offense is protected against double jeopardy, since conviction or acquittal under either offense results in conviction or acquittal of the other offense. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953); *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952).

In light of the purpose of the Major Crimes Act (MCA) and uniform authority, defendant's argument that the district court should have applied Idaho's double jeopardy law failed, because what Idaho courts might think about the legality of defendant's federal prosecution was irrelevant, and the MCA's incorporation of state law notwithstanding, the offense for which defendant was prosecuted was a federal offense, and whether defendant's prose-

cution violated the Double Jeopardy Clause is a federal issue to be determined by reference to federal constitutional principles. *United States v. Pluff*, 253 F.3d 490 (9th Cir. 2001).

Collateral References. 22 C.J.S., Criminal Law, § 208 et seq.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense. 50 A.L.R. 943.

Habeas corpus, former jeopardy as ground for. 8 A.L.R.2d 285.

Conviction of lesser offense as bar to prosecution for greater or new trial. 61 A.L.R.2d 1141.

What constitutes accused's consent to court's withdrawal of case from jury so as to constitute waiver of plea of former jeopardy. 63 A.L.R.2d 782.

Effect as double jeopardy of court's grant of new trial on own motion in criminal case. 85 A.L.R.2d 486.

Plea of *nolo contendere* or *non vult contendere* as affecting claim. 89 A.L.R.2d 540.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Propriety of increased punishment on new trial for same offense. 12 A.L.R.3d 978.

When does jeopardy attach in a nonjury trial. 49 A.L.R.3d 1039.

19-108. Self-incriminating evidence — Restraint of person. — No person can be compelled in a criminal action to be a witness against himself, nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. [Cr. Prac. 1864, § 12; R.S., R.C., & C.L., § 7357; C.S., § 8623; I.C.A., § 19-108.]

Cross ref. Constitutional guaranty, Const., Art. 1, § 13.

Cited in: *State v. Hargraves*, 62 Idaho 8, 107 P.2d 854 (1940); *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

ANALYSIS

Cross-examination.

—By prosecutor.

Prior conviction.

Cross-Examination.

Court should instruct jury in proper case that no presumption can be raised against defendant by reason of his refusal to testify, but where defendant voluntarily submits himself as a witness in his own behalf, he may

be cross-examined by state, subject to the same rules and regulations governing cross-examination that apply to other witnesses. *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911).

Provisions of this section are qualified by rule that one who has voluntarily made himself witness in his own behalf is subject to same rules of cross-examination that apply to all other witnesses. *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

—By Prosecutor.

Where defendant had requested to see a detective and in the discussion which followed

waived his right to remain silent and denied any knowledge of the crimes and referred to the victim as "this such and such lady," a term which can be construed to contradict his in-court assertion that he had an affair with the victim, the prosecutor's questions at trial concerning his initial failure to tell police he knew the victim did not impermissibly infringe on the exercise of his right to remain silent. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Prior Conviction.

This section is not violated by requiring a criminal defendant who has voluntarily taken the witness stand in his own behalf to answer on cross-examination whether or not he has been convicted of a felony. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Collateral References. 21A Am. Jur. 2d, Criminal Law, §§ 1137 — 1183.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights. 18 A.L.R.2d 796.

Requiring submission to physical examination or test as violation of constitutional rights. 25 A.L.R.2d 1407.

Sufficiency of witness' claim of privilege. 51 A.L.R.2d 1178.

Severance where codefendant has incriminated himself. 54 A.L.R.2d 830.

Admissibility of sound recordings in evidence as affected by privilege against self-incrimination. 58 A.L.R.2d 1024, 1036; 57 A.L.R.3d 746; 58 A.L.R.3d 598.

Court's duty to inform accused who is not represented by counsel of his right not to testify. 79 A.L.R.2d 643.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question. 9 A.L.R.3d 990.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification. 24 A.L.R.3d 1261.

Propriety of requiring accused to give handwriting exemplar. 43 A.L.R.3d 653.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense with which accused is charged. 19 A.L.R.4th 368.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 A.L.R.4th 1112.

Admissibility and weight of blood grouping tests in disputed paternity cases. 43 A.L.R.4th 579.

Admissibility of bare footprint evidence. 45 A.L.R.4th 1178.

19-109. Prerequisites to conviction. — No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon a judgment of a probate or justice's court, a jury having been waived, in a criminal case not amounting to a felony. [Cr. Prac. 1864, § 13; R.S., R.C., & C.L., § 7358; C.S., § 8624; I.C.A., § 19-109.]

19-110. Expedition of court proceedings. — In all criminal cases and juvenile fact finding hearings that involve a child victim or witness, the court and the prosecuting attorney shall take all appropriate actions to ensure a speedy trial in order to minimize the length of time the child must endure the stress of his or her involvement in the proceedings. In ruling on any motion or other request for a delay or continuance of any proceeding, the court shall consider and give weight to any adverse impact that the requested delay or continuance may have on the well-being of a child victim or witness, and findings of fact shall be made on this issue. [I.C., § 19-110, as added by 1989, ch. 303, § 1, p. 758.]

CHAPTER 2

PREVENTION OF PUBLIC OFFENSES

SECTION.

19-201. Lawful resistance.

19-202. Resistance by threatened party.

19-202A. Legal jeopardy in cases of self-de-

SECTION.

fense and defense of other threatened parties.

19-203. Resistance by other parties.

SECTION.

- 19-204. Prevention of offenses by officers of justice.
- 19-205. Prevention by persons assisting officers.
- 19-206. Security to keep peace — Information of threatened offense.
- 19-207. Examination of complainant.
- 19-208. Warrant of arrest.
- 19-209. Hearing of controverted charge.
- 19-210. Discharge of accused.
- 19-211. Security to keep the peace.
- 19-212. Effect of giving or refusing security.
- 19-213. Commitment for not giving security.
- 19-214. Security filed in clerk's office.
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SECTION.

- 19-217. Action on undertaking.
- 19-218. Evidence of breach.
- 19-219. Provisions of chapter exclusive.
- 19-220. Public peace — How preserved.
- 19-221. Suppression of riots — Officers may command assistance.
- 19-222. Certificate of person resisting process.
- 19-223. Governor may call out militia.
- 19-224. Commanding rioters to disperse.
- 19-225. Arrest of rioters.
- 19-226. Command of armed force.
- 19-227. Proclamation of insurrection.
- 19-228. Disobedience of proclamation.
- 19-229. Revocation of proclamation.

19-201. Lawful resistance. — Lawful resistance to the commission of a public offense may be made:

1. By the party about to be injured.
2. By other parties. [I.C., § 19-201, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 14; R.S., R.C., & C.L., § 7368; C.S., § 8625; I.C.A., § 19-201, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

Cross ref. Idaho Criminal Rules, see Court Rules Volume.

Cited in: *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

ANALYSIS

Reasonable fear.
Self-defense.

Reasonable Fear.

Because the right to defend oneself embodied in statutes does not require that the defendant believe himself to be in danger of great bodily injury in order to assert self-defense as justification for a battery, evidence of reasonable fear of some level of bodily harm was all that was required for the defendant to have the jury instructed on self-defense. *State v. Hansen*, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999).

Self-Defense.

The right of self-defense arises the moment

an attack is made, though the party assailed may not have reason to believe that his assailant intends to inflict upon him "great bodily injury." It may be, that the assailant intends to chastise or whip his victim without any real or apparent intention of inflicting serious bodily injury, but when he makes the attack, or it becomes apparent that he intends to execute such purpose, and with present ability so to do, the right of defense arises and clothes the intended victim with legal authority to resist, and if possible, prevent the execution of such unlawful purpose. No man has a right to lay hostile, threatening hands on another, except when he is armed with legal authority to do so; and the one who does so acts at the risk of being met with sufficient superior force and violence to overcome such assault. *State v. Woodward*, 58 Idaho 385, 74 P.2d 92 (1937).

In a prosecution for assault with a deadly weapon, it was error to instruct the jury that the defendant was entitled to bear firearms under the constitution with the addition that the legislature had power to regulate the exercise of such right and that the jury could consider this in connection with other instructions, where court did not tell the jury how the legislature had regulated such right. *State v. Woodward*, 58 Idaho 385, 74 P.2d 92 (1937).

19-202. Resistance by threatened party. — Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person, or his family, or some member thereof.

2. To prevent an illegal attempt by force to take or injure property in his lawful possession. [I.C., § 19-202, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 15; R.S., R.C., & C.L., § 7369; C.S., § 8626; I.C.A., § 19-202, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

Cited in: State v. Woodward, 58 Idaho 385, 74 P.2d 92 (1937).

ANALYSIS

Homicide.

Jointly owned property.

Self-defense.

Homicide.

An instruction in a homicide case was incorrect when based on former §§ 19-202 and 19-203, which gave the right to use resistance sufficient to prevent the offense, since the law relevant to a homicide case was former § 18-4009, which permitted self-defense with a deadly weapon where accused had reasonable cause to believe he was in danger of "great

bodily injury" or where the person being defended was in similar danger. State v. Rodriguez, 93 Idaho 286, 460 P.2d 711 (1969).

Jointly Owned Property.

This section does not apply to taking of property jointly owned by parties and in possession of one of them. State v. Roby, 43 Idaho 724, 254 P. 210 (1927).

Self-Defense.

In prosecution for aggravated assault, the trial court did not err in refusing to give the requested self-defense instructions where any threat to the defendant had subsided when the victim left his presence; thus, he was not "about to be injured" and lawful resistance was unnecessary. State v. Mason, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Because the right to defend oneself embodied in statutes does not require that the defendant believe himself to be in danger of great bodily injury in order to assert self-defense as justification for a battery, evidence of reasonable fear of some level of bodily harm was all that was required for the defendant to have the jury instructed on self-defense. State v. Hansen, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999).

19-202A. Legal jeopardy in cases of self-defense and defense of other threatened parties. — No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary, or when coming to the aid of another whom he reasonably believes to be in imminent danger of or the victim of aggravated assault, robbery, rape, murder or other heinous crime. [I.C., § 19-202A, as added by 1974, ch. 238, § 1, p. 1601.]

ANALYSIS

Construction.

Fear of bodily harm.

Construction.

This section cannot be construed to mean that "coming to the aid" of a victim applies when the crime against the victim is long past, nor does "victim" mean a victim against whom a crime has already been completed. State v. Arrasmith, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998).

Because the right to defend oneself embodied in statutes does not require that the defendant believe himself to be in danger of

great bodily injury in order to assert self-defense as justification for a battery, evidence of reasonable fear of some level of bodily harm was all that was required for the defendant to have the jury instructed on self-defense. State v. Hansen, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999).

Fear of Bodily Harm.

Court, in defendant's domestic battery case, did not err by denying defendant's request for a self-defense instruction where defendant presented no evidence that defendant reasonably feared some degree of bodily harm from the victim. State v. Hoover, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003).

19-203. Resistance by other parties. — Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. [I.C., § 19-203, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 16; R.S., R.C., & C.L., § 7370; C.S., § 8627; I.C.A., § 19-203, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

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Homicide.

An instruction in a homicide case was in-

19-204. Prevention of offenses by officers of justice. — Public offenses may be prevented by the intervention of the officers of justice:

1. By requiring security to keep the peace.
2. By forming a police in cities and towns, and by requiring their attendance in exposed places.
3. By suppressing riots. [Cr. Prac. 1864, § 17; R.S., R.C., & C.L., § 7375; C.S., § 8628; I.C.A., § 19-204.]

19-205. Prevention by persons assisting officers. — When the officers of justice are authorized to act in the prevention of public offenses, other persons who, by their command, act in their aid, are justified in so doing. [I.C., § 19-205, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 18; R.S., R.C., & C.L., § 7376; C.S., § 8629; I.C.A., § 19-205, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

19-206. Security to keep peace — Information of threatened offense. — An information may be laid before any magistrate that a person has threatened to commit an offense against the person or property of another. [Cr. Prac. 1864, § 19; R.S., R.C., & C.L., § 7380; C.S., § 8630; I.C.A., § 19-206.]

Cited in: *State v. Syster*, 33 Idaho 761, 197 P. 1025 (1921).

19-207. Examination of complainant. — When the information is laid before such magistrate he must examine on oath the informer, and any witness he may produce, and must take their depositions in writing and cause them to be subscribed by the parties making them. [Cr. Prac. 1864, § 20; R.S., R.C., & C.L., § 7381; C.S., § 8631; I.C.A., § 19-207.]

19-208. Warrant of arrest. — If it appears from the depositions that there is just reason to fear the commission of the offense threatened by the person so informed against, the magistrate must issue a warrant, directed generally to the sheriff of the county or any constable, marshal or policeman in the state, reciting the substance of the information, and commanding the officer forthwith to arrest the person informed of and bring him before the magistrate. [Cr. Prac. 1864, § 21; R.S., R.C., & C.L., § 7382; C.S., § 8632; I.C.A., § 19-208.]

19-209. Hearing of controverted charge. — When the person informed against is brought before the magistrate, if the charge be controverted the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses. [Cr. Prac. 1864, § 22; R.S., R.C., & C.L., § 7383; C.S., § 8633; I.C.A., § 19-209.]

19-210. Discharge of accused. — If it appears that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged. [Cr. Prac. 1864, § 23; R.S., R.C., & C.L., § 7384; C.S., § 8634; I.C.A., § 19-210.]

19-211. Security to keep the peace. — If, however, there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding \$5,000, as the magistrate may direct, with one or more sufficient sureties, to keep the peace towards the people of this state, and particularly towards the informer. The undertaking is valid and binding for six months, and may, upon the renewal of the information, be extended for a longer period, or a new undertaking may be required. [Cr. Prac. 1864, § 24; R.S., R.C., & C.L., § 7385; C.S., § 8635; I.C.A., § 19-211.]

Cross ref. Surety bonds in lieu of other bonds, § 41-2604.

Appeals.

Order of magistrate requiring security to

keep peace is not judgment of conviction rendered in criminal action and no appeal lies from such order. *State v. Syster*, 33 Idaho 761, 197 P. 1025 (1921).

19-212. Effect of giving or refusing security. — If the undertaking required by the last section is given, the party informed of must be discharged. If he does not give it, the magistrate must commit him to prison, specifying in the warrant the requirement to give security, the amount thereof and the omission to give the same. [Cr. Prac. 1864, § 25; R.S., R.C., & C.L., § 7386; C.S., § 8636; I.C.A., § 19-212.]

19-213. Commitment for not giving security. — If the person complained of is committed for not giving the undertaking required, he may be discharged by any magistrate upon giving the same. [Cr. Prac. 1864, § 26; R.S., R.C., & C.L., § 7387; C.S., § 8637; I.C.A., § 19-213.]

19-214. Security filed in clerk's office. — The undertaking must be filed by the magistrate in the office of the clerk of the district court. [Cr. Prac. 1864, § 27; R.S., R.C., & C.L., § 7388; C.S., § 8638; I.C.A., § 19-214.]

19-215. Security for threats to assault. — A person who, in the presence of a court magistrate, assaults or threatens to assault another, or to commit an offense against his person or property, may be ordered by the court or magistrate to give security, as in this chapter provided, and if he refuse so to do, may be committed. [Cr. Prac. 1864, § 28; R.S., R.C., & C.L., § 7389; C.S., § 8639; I.C.A., § 19-215.]

19-216. Breach of security. — Upon the conviction of the person informed against, of a breach of the peace, the undertaking is broken. [Cr. Prac. 1864, § 29; R.S., R.C., & C.L., § 7390; C.S., § 8640; I.C.A., § 19-216.]

19-217. Action on undertaking. — Upon the prosecuting attorney's producing evidence of such conviction to the district court of the county, the court must order the undertaking to be prosecuted, and the prosecuting attorney must thereupon commence an action upon it in the name of the state of Idaho. [Cr. Prac. 1864, § 30; R.S., R.C., & C.L., § 7391; I.C.A., § 19-217.]

19-218. Evidence of breach. — In the action the offense stated in the record of conviction must be alleged as a breach of the undertaking, and such record is conclusive evidence of the breach. [Cr. Prac. 1864, § 31; R.S., R.C., & C.L., § 7392; C.S., § 8642; I.C.A., § 19-218.]

19-219. Provisions of chapter exclusive. — Security to keep the peace, or to be of good behavior, can not be required except as prescribed in this chapter. [Cr. Prac. 1864, § 32; R.S., R.C., & C.L., § 7393; C.S., § 8643; I.C.A., § 19-219.]

19-220. Public peace — How preserved. — The mayor or other officer having the direction of the police of a city or town, must order a force sufficient to preserve the peace to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended. [Cr. Prac. 1864, § 33; R.S., R.C., & C.L., § 7394; C.S., § 8644; I.C.A., § 19-220.]

Cross ref. Affrays, breaches of the peace, riots and insurrections, sheriff to prevent and suppress, § 31-2202. Smoking during public meetings punishable by fine, §§ 18-5904 — 18-5906.

19-221. Suppression of riots — Officers may command assistance. — When a sheriff or other public officer, authorized to execute process, finds, or has reason to apprehend, that resistance will be made to the execution of the process, he may command as many bona fide male citizens, residents of his county, as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining the persons resisting, their aiders and abettors. [Cr. Prac. 1864, § 34; R.S., § 7400; am. 1893, p. 13, § 1; reen. 1899, p. 169, § 1; reen. R.C., & C.L., § 7400; C.S., § 8645; I.C.A., § 19-221.]

19-222. Certificate of person resisting process. — The officer must certify to the court from which the process is issued, the names of the persons resisting and their aiders and abettors, to the end that they may be proceeded against for their contempt of court. [Cr. Prac. 1864, § 35; R.S., R.C., & C.L., § 7401; C.S., § 8646; I.C.A., § 19-222.]

19-223. Governor may call out militia. — If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, he must, upon the application of the sheriff of the county, order such portion as shall be sufficient, or the whole, if necessary, of the militia of the state, to proceed to the assistance of the sheriff. [Cr. Prac. 1864, § 37; R.S., R.C., & C.L., § 7402; C.S., § 8647; I.C.A., § 19-223.]

Cross ref. Calling out national guard,
§ 46-602 et seq.

19-224. Commanding rioters to disperse. — Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the people of the state immediately to disperse. [I.C., § 19-224, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 38; R.S., R.C., & C.L., § 7403; C.S., § 8648; I.C.A., § 19-224, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

Cross ref. Riot defined, § 18-6401.

Unlawful assembly defined, § 18-6404.

19-225. Arrest of rioters. — If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county. [I.C., § 19-225, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, §§ 39, 42; R.S., R.C., & C.L., § 7404; C.S., § 8649; I.C.A., § 19-225, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch.

336, § 3, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

19-226. Command of armed force. — When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, it must obey the orders in relation thereto of such civil officer. [Cr. Prac. 1864, § 43; R.S., R.C., & C.L., § 7405; C.S., § 8650; I.C.A., § 19-226.]

Habeas Corpus.

Suspension of writ of habeas corpus in case of insurrection or rebellion. In re Boyle, 6

Idaho 609, 57 P. 706, 96 Am. St. R. 286 (1899), appeal dismissed, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215 (1900).

19-227. Proclamation of insurrection. — When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officer having the process to execute it, he may, on the application of the officer, or of the prosecuting attorney, or probate judge of the county, by proclamation to be published in such papers as he shall direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of volunteer or uniform companies, or other militia of the state as he shall deem necessary to serve for such term, and under the command of such officer or officers, as he shall direct. [Cr. Prac. 1864, § 46; R.S., R.C., & C.L., § 7406; C.S., § 8651; I.C.A., § 19-227.]

Cross ref. Calling out national guard, § 46-602 et seq.

ANALYSIS

In general.

Power of governor.

Review of governor's actions.

for a proclamation of martial law, the governor may issue the proclamation without application from local civil authorities. In re Boyle, 6 Idaho 609, 57 P. 706 (1899), appeal dismissed, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215 (1900).

In General.

Proclamation of governor declaring certain county to be in state of rebellion and calling to his aid military forces of the United States had effect of limited martial law in the county and was in harmony with orderly constitutional government. In re Boyle, 6 Idaho 609, 57 P. 706 (1899), appeal dismissed, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215 (1900).

Review of Governor's Actions.

The truth of recitals of alleged facts in a proclamation issued by the governor, proclaiming a certain county to be in a state of insurrection and rebellion, will not be inquired into or reviewed on application for a writ of habeas corpus. In re Boyle, 6 Idaho 609, 57 P. 706 (1899), appeal dismissed, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215 (1900).

Power of Governor.

If county officers fail in their duty to apply

19-228. Disobedience of proclamation. — Any person who, after the publication of such proclamation, resists or aids in resisting the execution of process in any county so declared to be in a state of insurrection, or who aids or attempts the rescue or escape of any person from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, shall be punished by imprisonment in the state prison for a term not less than two (2) years. [I.C., § 19-228, as added by 1972, ch. 336, § 3, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 48; R.S., R.C., & C.L., § 7407; C.S., § 8652; I.C.A., § 19-228, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 3,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 2 of S.L. 1972, ch. 336 is compiled as § 19-107 and § 4 is compiled as §§ 19-301 — 19-316.

19-229. Revocation of proclamation. — The governor may, when he thinks proper, revoke the proclamation authorized by the last section, or declare that it shall cease at the time and in the manner directed by him. [Cr. Prac. 1864, § 47; R.S., R.C., & C.L., § 7408; C.S., § 8653; I.C.A., § 19-229.]

CHAPTER 3

LOCAL JURISDICTION OF PUBLIC OFFENSES

SECTION.

- 19-301. All offenders liable to punishment.
- 19-302. Offenses commenced without the state.
- 19-303. Fighting duels out of the state.
- 19-304. Offenses committed in different counties.
- 19-305. Offenses committed on or near county boundaries.
- 19-306. Offenses committed on boats, vessels, trains, motor vehicles or aircraft.
- 19-307. Kidnaping and similar offenses.
- 19-308. Bigamy or incest.

SECTION.

- 19-309. Stolen property carried from county to county.
- 19-310. Escape from prison.
- 19-311. Bringing stolen property into the state.
- 19-312. Murder or manslaughter.
- 19-313. Venue over accessories.
- 19-314. Venue over absent principal.
- 19-315. Conviction or acquittal in another state.
- 19-316. Conviction or acquittal in another county.

19-301. All offenders liable to punishment. — (1) Jurisdiction — venue. Every person is liable to punishment by the laws of this state, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. Evidence that a prosecutable act was committed within the state of Idaho is a jurisdictional requisite, and proof of such must be shown beyond a reasonable doubt.

(2) Venue is nonjurisdictional. Proof that venue is proper under this chapter is satisfied if shown by a preponderance of the evidence. [I.C., § 19-301, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 1, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 81; R.S., R.C., & C.L., § 7480; C.S., § 8685; I.C.A., § 19-301, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Cross ref. Jurisdiction of magistrates, I.C.R. 2.2.

State jurisdiction over civil and criminal enforcement of certain matters in Indian Country, §§ 67-5101 — 67-5103.

Cited in: Pittam v. Maynard, 103 Idaho 177, 646 P.2d 419 (1982).

ANALYSIS

Child custody.
Crimes committed "within the state".
Establishing venue.
Guilty plea.
"Prosecutable act" defined.

Child Custody.

Because the withholding of the child from the custodial parent in violation of a court order is no different than the withholding of support from a family in violation of a court order, the keeping or withholding occurs, for purposes of jurisdiction, where the defendant is required to return the child to the custodial parent. State v. Doyle, 121 Idaho 911, 828 P.2d 1316 (1992).

Where the second and third elements of the crime of child custody interference, the keeping or withholding and the deprivation of the

custodial rights, occurred in Idaho, under §§ 18-202, this section and 19-302, the state had jurisdiction over the crime. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Crimes Committed "Within the State".

An Idaho court will have subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Given the language in § 18-202 and in this section requiring that the crime must occur "in whole or in part" within the state, or that some "prosecutable act" must have been committed within the state, the language in § 19-302 must be interpreted to mean that the result of the crime must be an essential element of the offense before the result can be construed to have been "consummated" within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

So long as the prosecution proves the crime occurred within the state of Idaho, the precise location of the crime within any particular county in Idaho is not required as an element to establish that a crime has been committed by the accused; because venue did not need to be proved because it was not an element of a crime, the district court did not err in denying defendant's motion to dismiss for failure of the state to provide evidence of venue. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Establishing Venue.

Venue is nonjurisdictional; proof of proper venue is satisfied if shown by a preponderance of the evidence, direct or circumstantial evidence may be used to establish venue. *State v. Wimer*, 118 Idaho 732, 800 P.2d 128 (Ct. App. 1990).

Guilty Plea.

The question of which county in the State of Idaho should be the situs for prosecution of a crime occurring in this state is no longer a jurisdictional question. It is simply a question of venue, and a valid plea of guilty waives all nonjurisdictional defects and defenses, including any defense of improper venue; the exception to this rule being created by the entry of a written conditional guilty plea, meeting the requirements of ICR 11(a)(2), which expressly reserves specific issues for review on appeal. *State v. Magill*, 119 Idaho 218, 804 P.2d 947 (Ct. App. 1991).

"Prosecutable Act" Defined.

Although the term "prosecutable act" contained in this section has not been defined by the legislature or by the Idaho Supreme Court, it would appear that, to be consistent with § 18-202, "prosecutable act" means any essential element of the crime. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 538-594.

22 C.J.S., Criminal Law, §§ 177-195.

Construction and effect of statutes providing for venue of criminal case in either county where crime is committed partly in one county and partly in another. 30 A.L.R.2d 1265; 73 A.L.R.3d 907; 100 A.L.R.3d 1174; 11 A.L.R.4th 704.

Power of court to make or permit amendment of indictment with respect to allegations as to place. 14 A.L.R.3d 1335.

Necessity of proving venue or territorial jurisdiction of criminal offenses beyond reasonable doubt. 67 A.L.R.3d 988.

Venue in homicide cases where crime is committed partly in one county and partly in another. 73 A.L.R.3d 907.

Where is embezzlement committed for purposes of territorial jurisdiction or venue. 80 A.L.R.3d 514.

19-302. Offenses commenced without the state. — When the commission of a public offense, commenced without the state is consummated within its boundaries, the defendant is liable to punishment therefor in this state, though he was out of the state at the time of the commission of the offense charged. If he consummated it in this state through the intervention of an innocent or guilty agent, or any other means proceeding directly from himself, in such case the venue is in the county in which the offense is consummated. [I.C., § 19-302, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 2, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 82; R.S., R.C., & C.L., § 7481; C.S., § 8686; I.C.A., § 19-302, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4,

in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Section 14 of S.L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

Cross ref. Farm produce dealers, venue of prosecutions against, § 22-1315.

Cited in: *In re Moyer*, 12 Idaho 250, 85 P. 897, 12 L.R.A. (n.s.) 227, 118 Am. St. R. 214 (1906).

ANALYSIS

Child custody.
Child support.
Criminal acts.
In general.

Child Custody.

Because the withholding of the child from the custodial parent in violation of a court order is no different than the withholding of support from a family in violation of a court order, the keeping or withholding occurs, for purposes of jurisdiction, where the defendant is required to return the child to the custodial parent. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Where the second and third elements of the crime of child custody interference, the keeping or withholding and the deprivation of the custodial rights, occurred in Idaho, under §§ 18-202, 19-301 and this section, the state had jurisdiction over the crime. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

19-303. Fighting duels out of the state. — When an inhabitant or resident of this state, by previous appointment or engagement, fights a duel or is concerned as second therein, out of the jurisdiction of this state, and in the duel a wound is inflicted upon a person, whereof he dies in this state, the jurisdiction of the offense is in the state of Idaho and venue is in the county where the death happens. [I.C., § 19-303, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 3, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 83; R.S., R.C., & C.L., § 7482; C.S., § 8687; I.C.A., § 19-303, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4,

Child Support.

Where defendant was residing in Nevada at the times relevant to a charge of nonsupport of his minor children the Idaho court had jurisdiction to try defendant. *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975).

Criminal Acts.

An Idaho court will have subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

Given the language in § 18-202 and § 19-301 requiring that the crime must occur "in whole or in part" within the state, or that some "prosecutable act" must have been committed within the state, the language in this section must be interpreted to mean that the result of the crime must be an essential element of the offense before the result can be construed to have been "consummated" within Idaho. *State v. Doyle*, 121 Idaho 911, 828 P.2d 1316 (1992).

In General.

Venue of crime committed in part in Idaho and in part elsewhere is in any county where any part of it was committed. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-304. Offenses committed in different counties. — (1) When a public offense is committed in part in one (1) county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two (2) or more counties, the venue is in either county.

(2) When more than one (1) felony is committed in more than one (1) county pursuant to a continuing criminal transaction or a common scheme or plan, venue shall be in any county in which one or more of such offenses has occurred.

(3) If a crime has been committed in the state of Idaho but it cannot be shown which county properly has venue, then in such case Ada county shall

be the proper county of venue. [I.C., § 19-304, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 4, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 84; R.S., R.C., & C.L., § 7483; C.S., § 8688; I.C.A., § 19-304, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-202, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Cross ref. Aircraft, jurisdiction of crimes committed by or against airman or passenger while in flight over this state, § 21-207.

ANALYSIS

False pretenses.

Forgery.

In general.

False Pretenses.

When crime of obtaining money under false pretenses originated in one county and was completed in another, venue is in either county. *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921); *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Where check was obtained in one county and cashed in another, the crime of obtaining money under false pretenses originated in the first county, was completed in the second and the venue of the prosecution was in either county. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Where defendant, acting as agent for a foreign corporation, executed a fictitious contract for the sale of wool whereby such corporation honored defendant's sight draft, defendant was properly tried for obtaining money

under false pretenses in the county where the draft was drawn and paid, and from which such contract was sent. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Forgery.

Where defendant was tried on information that he both forged and uttered a forged note, two acts which constitute the same crime in Idaho, and one of the acts, that of uttering the forged note, occurred in Bingham County, said county had jurisdiction over the entire crime. *State v. May*, 93 Idaho 343, 461 P.2d 126 (1969).

In General.

Venue of crime committed partly in Idaho and partly elsewhere is any county where any part of it was committed. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Collateral References. Constitutionality of statute fixing venue of offense committed while upon a public conveyance, or at a station or depot upon the route thereof. 11 A.L.R. 1020.

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed. 43 A.L.R. 545.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed. 76 A.L.R. 1034.

Interlocutory order of one judge concerning change of venue as binding on another judge in same case. 132 A.L.R. 72.

Check, note, etc., or signature thereon, venue of criminal prosecution predicated upon fraudulent obtaining of, from the person executing the same. 141 A.L.R. 239.

Presumption or inference as to place of forgery, arising from unexplained possession or uttering of forged paper. 164 A.L.R. 649.

19-305. Offenses committed on or near county boundaries. —

When a public offense is committed on the boundary of two (2) or more counties, or within five hundred (500) yards thereof, if the place where the crime is committed cannot be ascertained with reasonable certainty by the law enforcing officers of either county, or if a misdemeanor or infraction is committed in a city which is located in two (2) counties, then in any such event the venue is in either county. Provided however, that a prosecution in one (1) county shall be a bar to a prosecution for the same act or offense in the other county. [I.C., § 19-305, as added by 1972, ch. 336, § 4, p. 844; am. 1976, ch. 24, § 1, p. 59; am. 1986, ch. 289, § 5, p. 727; am. 2001, ch. 121, § 1, p. 415.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 85; R.S., R.C., & C.L., § 7484; C.S., § 8689; I.C.A., § 19-305;

am. 1945, ch. 22, § 1, p. 29, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by

S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Section 2 of S.L. 1976, ch. 24, provided that the act should take effect on and after July 1, 1976.

ANALYSIS

Constitutionality.

In general.

Writ of prohibition.

Constitutionality.

This statute is constitutional and does not violate Const., Art. 1, § 7. *Kaseris v. Justice*

Court, 65 Idaho 347, 144 P.2d 469 (1943).

In General.

Court had jurisdiction of defendant charged with commission of offense in adjoining county but within 500 yards of boundary. *State v. Kaseris*, 66 Idaho 449, 162 P.2d 172 (1945).

Writ of Prohibition.

Where accused demurred to criminal complaint on ground that justice court was without jurisdiction and that this section was unconstitutional, and such demurrer was overruled, defendant had an adequate remedy at law and prohibition would not lie to restrain the justice court from trying the case. *Kaseris v. Justice Court*, 65 Idaho 347, 144 P.2d 469 (1943).

19-306. Offenses committed on boats, vessels, trains, motor vehicles or aircraft. — When an offense is committed in this state, on board a boat, vessel, motor vehicle or aircraft, the venue is in the county through which the boat, vessel, railroad train, motor vehicle, or aircraft passes or in the county where the trip terminates. [I.C., § 19-306, as added by 1972, ch. 336, § 4, p. 844; am. 1980, ch. 295, § 1, p. 766; am. 1986, ch. 289, § 6, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 86; R.S., R.C., & C.L., § 7485; C.S., § 8690; I.C.A., § 19-306, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Cross ref. Venue of prosecutions for stealing rides on trains, § 18-4619.

Collateral References. 21 Am. Jur. 2d, Criminal Law, § 491.

19-307. Kidnaping and similar offenses. — In any case where a person:

1. Seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of this state, or in any way held to service or kept or detained against his will; or

2. Leads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof, or with intent to steal any article upon the person of the child; or

3. Abducts, entices or by force or fraud unlawfully takes or carries away another at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state; or

4. Seizes, confines, inveigles, leads, takes, entices away or kidnaps another against his will to extort money, property or any other things of

value or obtain money, property or reward or any other thing of value for the return or disposition of such person; or

5. Inveigles or entices any unmarried person of previous chaste character, under the age of eighteen (18) years, into any house of ill-fame, or of assignation, or elsewhere, for the purpose of prostitution, or to have illicit carnal connection with any other person; and every person who aids or assists in such inveiglement or enticement; or

6. Takes away any person under the age of eighteen (18) years from his or her father, mother, guardian, or other person having the legal charge of that person, without their consent, for the purpose of prostitution;

Venue is in the county in which the offense is committed, or out of which the person upon whom the offense was committed may, in the commission of the offense, have been brought, or in which an act was done by the defendant in instigating, procuring, promoting, or aiding in the commission of the offense, or in abetting the parties concerned therein. [I.C., § 19-307, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 7, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 87; R.S., R.C., & C.L., § 7486; C.S., § 8691; I.C.A., § 19-307, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Jurisdiction.

Where a mother was permitted visitation of her two children who were in the custody of the department of health and welfare and at the time the mother was expected to return the children they were with her in Montana, the alleged kidnapping occurred in Montana and since there were no travel restrictions during the allowed visitation time jurisdiction did not exist in the state of Idaho. State v. Cochran, 96 Idaho 862, 538 P.2d 791 (1975).

19-308. Bigamy or incest. — When the offense either of bigamy or incest is committed in one county, and the defendant is apprehended in another, the venue is in either county. [I.C., § 19-308, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 8, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 88; R.S., R.C., & C.L., § 7487; C.S., § 8692; I.C.A., § 19-308, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section added by S.L. 1972, ch. 336, § 4,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-309. Stolen property carried from county to county. — When property taken in one county by burglary, robbery, or theft has been brought into another, the venue of the offense is in either county. But, if at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the sheriff of the former. [I.C., § 19-309, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 9, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 89; R.S., R.C., & C.L., § 7488; C.S., § 8693; I.C.A., § 19-309, was repealed by S.L. 1971, ch. 143, § 5,

effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Venue.

Evidence as to acts of appellant in aiding to load a steer into a truck after the steer had been killed, dressing the steer out, and transporting it to the South Fork Lodge, with

intent to deprive the owner of his property, was sufficient to establish appellant as a principal within the meaning of former § 18-204; and as principal he could be tried in either the county in which the steer was stolen or that in which the lodge was located. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

19-310. Escape from prison. — The venue of a criminal action for escaping from prison is in any county of the state. [I.C., § 19-310, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 10, p. 727.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7489; C.S., § 8694; I.C.A., § 19-310, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in

the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-311. Bringing stolen property into the state. — The venue of a criminal action for stealing, in any other state, the property of another, or receiving it, knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought. [I.C., § 19-311, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 11, p. 727.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7490; C.S., § 8695; I.C.A., § 19-311, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in

the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-312. Murder or manslaughter. — The venue of a criminal action for murder or manslaughter, when the injury which caused the death was inflicted in one county and the party injured dies in another county or out of the state, is in the county where the injury was inflicted. [I.C., § 19-312, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 12, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 24; R.S., R.C., & C.L., § 7491; C.S., § 8696; I.C.A., § 19-312, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

ANALYSIS

Death without state.
Evidence.

Death Without State.

Where injury which produced death was inflicted in one county and deceased was carried out of state in an effort to save his life, venue is properly laid in the county where injury was inflicted. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

Evidence.

Where the state presented uncontradicted evidence at trial that the authorities discovered the victim's decapitated body in Ada County some five miles from the Ada-Gem County line wrapped in a linen sheet and covered by a door showing that someone had placed the body there, this evidence unexplained, together with the evidence of other

articles found at the scene were sufficient to justify the jury in concluding that the homicide was committed in Ada County. *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979).

19-313. Venue over accessories. — In the case of an accessory in the commission of a public offense, the venue is in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county. [I.C., § 19-313, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 13, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 90; R.S., R.C., & C.L., § 7492; C.S., § 8697; I.C.A., § 19-313, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-314. Venue over absent principal. — The venue of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein. [I.C., § 19-314, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 14, p. 727.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7493; C.S., § 8698; I.C.A., § 19-314, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in

the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

19-315. Conviction or acquittal in another state. — When an act charged as a public offense, is within the venue of another state, territory, or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state. [I.C., § 19-315, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 15, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 91; R.S., R.C., & C.L., § 7494; C.S., § 8699; I.C.A., § 19-315, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

Double Jeopardy.

In light of the purpose of the Major Crimes Act (MCA) and uniform authority, defendant's argument that the district court should have applied Idaho's double jeopardy law failed, because what Idaho courts might think about

the legality of defendant's federal prosecution was irrelevant, and the MCA's incorporation of state law notwithstanding, the offense for which defendant was prosecuted was a federal offense, and whether defendant's prosecution violated the Double Jeopardy Clause is a federal issue to be determined by reference to federal constitutional principles. *United States v. Pluff*, 253 F.3d 490 (9th Cir. 2001); *In re Felton's Petition*, 79 Idaho 325, 316 P.2d 1064 (1957).

This section did not prohibit imposing illegal-drug tax on individual after his guilty plea to drug-possession charges in federal court, because this section applied to only subsequent criminal actions, not civil tax assessment. *Garcia v. State Tax Comm'n*, 136 Idaho 610, 38 P.3d 1266 (2002).

19-316. Conviction or acquittal in another county. — When an offense is within the venue of two (2) or more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment therefor in another. [I.C., § 19-316, as added by 1972, ch. 336, § 4, p. 844; am. 1986, ch. 289, § 16, p. 727.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 92; R.S., R.C., & C.L., § 7495; C.S., § 8700; I.C.A., § 19-316, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 4,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 3 of S.L. 1972, ch. 336 is compiled as §§ 19-201 — 19-202, 19-203, 19-205, 19-224, 19-225, 19-228 and § 5 is compiled as §§ 19-401 — 19-404.

CHAPTER 4

TIME OF COMMENCING CRIMINAL ACTIONS

SECTION.

19-401. Prosecutions for murder, voluntary manslaughter or rape.

19-402. Commencement of prosecutions for crimes against children and other felonies.

19-403. Misdemeanors.

SECTION.

19-404. Absence of defendant from state.

19-405. Indictment — When deemed found.

19-406. Commencement of prosecutions for sexual exploitation by medical care provider.

19-401. Prosecutions for murder, voluntary manslaughter or rape. — There is no limitation of time within which a prosecution for murder, voluntary manslaughter, or rape pursuant to section 18-6101 2., 3., 4., 5. or 7., or section 18-6108, Idaho Code, must be commenced. They may be commenced at any time after the death or rape of the person killed or raped. [I.C., § 19-401, as added by 1972, ch. 336, § 5, p. 844; am. 2000, ch. 276, § 2, p. 898; am. 2001, ch. 142, § 1, p. 507; am. 2003, ch. 280, § 2, p. 756.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 93; R.S., R.C., & C.L., § 7500; C.S., § 8701; I.C.A., § 19-401, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 5, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 4 of S.L. 1972, ch. 336 is compiled as §§ 19-301 — 19-316 and § 6 is compiled as § 19-1432.

Section 1 of S.L. 2000, ch. 276 contained a repeal.

Section 1 of S.L. 2003, ch. 280 is compiled as § 18-6101.

Section 4 of S.L. 2001, ch. 142 declared an emergency and provided: "This act shall be in full force and effect on and after its passage and approval, and shall apply retroactively to any violation alleged to have been committed as to which the time for commencing prosecution has not expired."

Cross ref. Complaint, initiation and prosecution, I.C.R. 3.

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 291 — 339.

22 C.J.S., Criminal Law, §§ 196 — 207.

Fraud as tolling period for bringing action prescribed in statute creating the right of action. 15 A.L.R.2d 500.

Provision of statute excluding period of defendant's absence from state as applicable to a local cause of action against individual who was a nonresident when the same arose. 17 A.L.R.2d 502.

First and last day included or excluded for purposes of statute of limitations. 20 A.L.R.2d 1249.

Summary judgment, raising statute of limitations by motion for. 61 A.L.R.2d 341.

Validity of statute enlarging limitation period. 79 A.L.R.2d 1080.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 A.L.R.3d 1297.

Necessity of alleging in indictment or information limitation-tolling facts. 52 A.L.R.3d 922.

When statute of limitations begins to run against criminal prosecution for embezzlement, fraud, false pretenses, or similar crimes. 77 A.L.R.3d 689.

When statute of limitation begins to run on

charge of obstructing justice or of conspiring to do so. 77 A.L.R.3d 725.

Imprisonment of party to civil action as tolling statute of limitations. 77 A.L.R.3d 735.

19-402. Commencement of prosecutions for crimes against children and other felonies. — (1) A prosecution for any felony other than murder, voluntary manslaughter, rape pursuant to section 18-6101 2., 3., 4., 5. or 7., or section 18-6108, Idaho Code, or any felony committed upon or against a minor child, or an act of terrorism as set forth in sections 18-8102, 18-8103, 18-3322, 18-3323 and 18-3324, Idaho Code, must be commenced by the filing of the complaint or the finding of an indictment within five (5) years after its commission. Except as provided in subsection (2) of this section, a prosecution for any felony committed upon or against a minor child must be commenced within five (5) years after the commission of the offense by the filing of the complaint or a finding of an indictment.

(2) A prosecution under section 18-1506 or 18-1508, Idaho Code, must be commenced within five (5) years after the date the child reaches eighteen (18) years of age.

(3) A prosecution under section 18-1506A, Idaho Code, must be commenced within three (3) years after the date of initial disclosure by the victim.

(4) Notwithstanding any other provision of law, an indictment may be found, or an information instituted, at any time without limitation for a prosecution under section 18-8103, 18-3322, 18-3323 or 18-3324, Idaho Code. [I.C., § 19-402, as added by 1972, ch. 336, § 5, p. 844; am. 1985, ch. 157, § 1, p. 416; am. 1989, ch. 270, § 2, p. 658; am. 1990, ch. 210, § 3, p. 467; am. 1992, ch. 146, § 1, p. 441; am. 2000, ch. 276, § 3, p. 898; am. 2001, ch. 142, § 2, p. 507; am. 2002, ch. 222, § 9, p. 623; am. 2003, ch. 280, § 3, p. 756.]

Legislative Intent. Section 1 of S.L. 1989, ch. 270 read: "It is the intent of the legislature that extension of the provisions of section 19-402, Idaho Code, shall apply to all cases for which the statute of limitations has not yet expired. The legislature specifically declares that it is the public policy of the state that such an extension is not an ex post facto law."

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 94; R.S., R.C., & C.L., § 7501; C.S., § 8702; I.C.A., § 19-402; am. S.L. 1953, ch. 168, § 1, p. 262, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 5, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 4 of S.L. 1972, ch. 336 is compiled as §§ 19-301 — 19-316 and § 6 is compiled as § 19-1432.

Section 3 of S.L. 2001, ch. 142 is compiled as § 19-625.

Section 8 of S.L. 2002, ch. 222 is compiled as § 18-8106.

Section 4 of S.L. 2001, ch. 142 declared an emergency and provided: "This act shall be in full force and effect on and after its passage and approval, and shall apply retroactively to any violation alleged to have been committed as to which the time for commencing prosecution has not expired."

Sec. to sec. ref. This section is referred to in § 63-3075.

Cited in: State v. Ruiz, 106 Idaho 336, 678 P.2d 1109 (1984); Smith v. State, 126 Idaho 106, 878 P.2d 805 (Ct. App. 1994); State v. Claxton, 128 Idaho 782, 918 P.2d 1227 (Ct. App. 1996).

ANALYSIS

Burden of proof.
Extension of limitations period.
Postponement.
Res judicata.
Securities fraud.

Speedy trial.

Statute of limitations.

—Moot upon finding of guilt.

Time of filing.

Burden of Proof.

Where the issue of the statute of limitations is raised, the state has the burden of proving that the offense was committed within the statutory period. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Although the state was required to prove the tolling of the statute of limitation, and the level of proof was proof beyond a reasonable doubt, it was not necessary for the state to prove each event that was alleged to have tolled the statute. All that was required was that the state prove that the statute had been tolled for a sufficient length of time to permit prosecution within the time allowed by this section. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Extension of Limitations Period.

A statute of limitations may be extended prior to the expiration of the original statute of limitations for a given cause of action, without being violative of the ex post facto law provisions of the United States and Idaho Constitutions. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

The application of § 19-404 operated to extend the limitation period while defendant was out of state even though defendant was not out of state when he committed the offenses of lewd conduct with a minor; it was impermissible to interpret § 19-404 as to require commission of the crime while defendant was out of state, in conjunction with a subsequent absence from the state. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

Postponement.

If the dismissal and renewal of the prosecution were to be regarded as postponement, it was for "good cause" and "sufficient reason" and was therefore authorized, since the absence of a material and essential witness is "good cause." *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Res Judicata.

The dismissal of the information and release of defendant's bail was not a bar to another prosecution, commenced within three years after the commission of the offense. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Securities Fraud.

Defendant's securities fraud crimes were governed by the longer five-year statute of

limitation, § 30-1443, a section of the Idaho Securities Act providing for criminal punishment for violations of the act, rather than by the three-year statute of limitation applicable to all felonies, under this section. *State v. Burchard*, 123 Idaho 382, 848 P.2d 440 (Ct. App. 1993).

Speedy Trial.

Where defendant was tried at the first term commencing after the filing of the new information, his constitutional right was accorded to him for a speedy trial. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Where mere defect in form of warrant of commitment for alleged first degree burglary resulted in discharge of defendant upon habeas corpus order, subsequent prosecution following rearrest and commitment, for the same crime, less than a month after writ was made permanent, was not improper and no denial of defendant's right to speedy trial. *State v. Stewart*, 87 Idaho 210, 392 P.2d 180 (1964).

Statute of Limitations.

Where the crime occurred no later than 1987 when defendant came into possession of truck with knowledge that it was stolen and with the intent to deprive the owner thereof, the statute of limitations had run by 1991 when the information against defendant was filed. *State v. Barnes*, 124 Idaho 379, 859 P.2d 1387 (1993).

—Moot Upon Finding of Guilt.

Magistrate's decision to deny motion of defendant to dismiss upon the defense that prosecution of the charges was barred by the statute of limitations essentially became moot upon the jury's verdict finding defendant guilty beyond a reasonable doubt. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Time of Filing.

Where an alleged forgery occurred on February 3, 1973 and the complaint was filed on January 27, 1976, the prosecution was commenced prior to the running of the statute of limitations. *Clark v. Meehl*, 98 Idaho 641, 570 P.2d 1331 (1977).

Collateral References. Discharge of accused under a limitation as a bar to a subsequent prosecution for the same offense. 3 A.L.R. 519.

Burden on state to show that crime was committed within limitation period. 13 A.L.R. 1446.

Filing or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

19-403. Misdemeanors. — A prosecution for any misdemeanor must be commenced by the filing of the complaint or the finding of an indictment within one (1) year after its commission. [I.C., § 19-403, as added by 1972, ch. 336, § 5, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 95; R.S., R.C., & C.L., § 7502; C.S., § 8703; I.C.A., § 19-403; am. S.L. 1953, ch. 168, § 2, p. 262, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 5, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 4 of S.L. 1972, ch. 336 is compiled as §§ 19-301 — 19-316 and § 6 is compiled as § 19-1432.

Sec. to sec. ref. This section is referred to in §§ 36-1406, 63-3075.

Cited in: *State v. Rae*, — Idaho —, 84 P.3d 586 (Ct. App. 2004).

ANALYSIS

Construction.

Defendant absent from state.

Pleading as defense.

Time included in period of limitation.

Construction.

By limiting time for prosecution, state has deprived itself of right to prosecute in all cases coming within terms of statute, and time within which offense is committed thus becomes jurisdictional fact in all cases subject to limitation. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Statutes of limitation in criminal cases differ from civil cases in that latter are statutes of repose while in criminal cases they create bar to prosecution. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Defendant Absent from State.

If the state relied upon the absence of the defendant from the state to toll the statute,

the fact of such absence must be alleged in the indictment or information for in such a case absence from the state was a jurisdictional fact, and when such fact was denied and put in issue by a plea of not guilty, upon trial such fact is tried with other issues and upon its determination depends the jurisdiction of the court. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

Pleading as Defense.

Where information charges that misdemeanor was committed more than year before filing thereof, it is subject to demurrer. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Plea of not guilty presents as issue of fact question of the bar of the statute. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921); *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

Time Included in Period of Limitation.

Where information is quashed on appeal, or proceedings on an information are set aside or reversed on appeal, time during which appeal was pending should not be included within the period of limitations. *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

Where demurrer on ground of duplicity is sustained, new information is not a continuation of prosecution instituted under original information. *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

Collateral References. Burden on state to show that crime was committed within limitation period. 13 A.L.R. 1446.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

19-404. Absence of defendant from state. — If, when the offense is committed, the defendant is out of the state, the indictment may be found within the term herein limited after his coming within the state, and no time during which the defendant is not an inhabitant of, or usually resident within, the state is part of the limitation. [I.C., § 19-404, as added by 1972, ch. 336, § 5, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 96; R.S., R.C., & C.L., § 7503; C.S., § 8704; I.C.A., § 19-404, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 5,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 4 of S.L. 1972, ch. 336 is compiled as §§ 19-301 — 19-316 and § 6 is compiled as § 19-1432.

Cited in: *State v. Amerson*, 129 Idaho 395,

925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

ANALYSIS

Burden of proof.

Extension of limitations period.

Burden of Proof.

Exception contained herein is not for benefit of accused but for benefit of state, and it is incumbent upon state to show that it obtains. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921); *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

Although the state was required to prove the tolling of the statute of limitation, and the level of proof was proof beyond a reasonable doubt, it was not necessary for the state to prove each event that was alleged to have tolled the statute. All that was required was

that the state prove that the statute had been tolled for a sufficient length of time to permit prosecution within the time allowed by § 19-402. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Extension of Limitations Period.

The application of this section operated to extend the limitation period while defendant was out of state even though defendant was not out of state when he committed the offenses of lewd conduct with a minor; it is impermissible to interpret this section as to require commission of the crime while defendant was out of state, in conjunction with a subsequent absence from the state. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

19-405. Indictment — When deemed found. — An indictment is found, within the meaning of this chapter, when it is presented by the grand jury in open court, and there received and filed. [Cr. Prac. 1864, § 97; R.S., R.C., & C.L., § 7504; C.S., § 8705; I.C.A., § 19-405.]

19-406. Commencement of prosecutions for sexual exploitation by medical care provider. — A prosecution for sexual exploitation by a medical care provider under section 18-919, Idaho Code, must be commenced by the filing of the complaint or the finding of an indictment within two (2) years after its commission. [I.C., § 19-406, as added by 1996, ch. 300, § 2, p. 988.]

Compiler's notes. Section 1 of S.L. 1996, ch. 300 is compiled as § 18-919.

CHAPTER 5

COMPLAINT AND WARRANT OF ARREST

SECTION.

- 19-501. Definition of complaint.
- 19-502. Definition of magistrate.
- 19-503. Who are magistrates.
- 19-504. Person lodging complaint.
- 19-505. Contents of complaint.
- 19-506. When warrant may issue.
- 19-507. Form of warrant.
- 19-508. Additional requirements of warrant.
- 19-509. To whom warrant directed.
- 19-510. Peace officers enumerated.
- 19-510A. Peace officers' powers to employees of the state board of correction.
- 19-511. Railroad and steamboat police.

SECTION.

- 19-512. Direction to officers throughout state.
- 19-513. [Repealed.]
- 19-514. Defendant to be taken before magistrate.
- 19-515. No unnecessary delay — Attorney may visit defendant.
- 19-516. Complaint to be transmitted to magistrate.
- 19-517. Offenses triable in another county — Proceedings.
- 19-518. Duties of officer.
- 19-519. Notice of defense of alibi.

19-501. Definition of complaint. — The complaint is the allegation in writing, made to a magistrate, that a person has been guilty of some

designated public offense. [Cr. Prac. 1864, § 99; R.S., R.C., & C.L., § 7509; C.S., § 8706; I.C.A., § 19-501; am. 1969, ch. 79, § 1, p. 230.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Complaint, information or indictment need not negate statutory defenses to certain offenses, § 19-1433.

Complaint, initiation and prosecution, I.C.R. 3.

Idaho Infraction Rules, application to magistrates, I.I.R., Rule 1.

Cited in: *State v. Raaf*, 16 Idaho 411, 101 P. 747 (1909).

ANALYSIS

Complaint and information.

Complaint as deposition.

Complaint by person other than prosecutor.

Coroner's inquisition.

Duty of arresting officer.

Name of defendant.

Complaint and Information.

It is clear that the words "complaint" and "information" are used to represent name of pleading by which criminal action is instituted and if the words "complaint" and "information" are not meant to apply to the same thing, it may be said that "complaint" is name given to pleading filed by any person other than prosecutor himself and that the same pleading is called "information" when pleading is filed by public prosecutor. *State v. Stafford*, 26 Idaho 381, 143 P. 528 (1914).

The state need not allege in the information that the complaint for acting as a real estate agent when unlicensed was filed within one year after the commission of the alleged offense since the docket certified by the probate judge acting as committing magistrate was filed in the district court and such record showed the date the complaint was filed and warrant issued and contained a copy of the complaint, warrant of arrest and return thereon. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

Complaint As Deposition.

In cases where no other depositions of witnesses are taken by the magistrate, the criminal complaint serves the dual purpose of commencing the prosecution and serving as a deposition upon which the warrant is issued. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959); *In re Martz*, 83 Idaho 72, 357 P.2d 940 (1960).

Complaint by Person Other Than Prosecutor.

Idaho's law provides that a warrant for arrest may be issued upon a complaint by a private citizen if the magistrate, after investigation, shall certify that the offense has been committed. *Howard v. Felton*, 85 Idaho 286, 379 P.2d 414 (1963).

Where a complaint alleging forgery was filed by an investigator for the attorney general's office, rather than by the county prosecutor, such complaint was competent to commence a criminal proceeding and confer jurisdiction on the magistrate since persons other than a prosecutor can file a complaint regardless of whether they act as private citizens or on behalf of a public officer. *Clark v. Meehl*, 98 Idaho 641, 570 P.2d 1331 (1977).

Idaho's law provides that a warrant for arrest may be issued upon a complaint filed upon information by a private citizen if the magistrate, after investigation, is satisfied that the offense has been committed, and hence, upon proper proceedings before a magistrate someone other than a prosecutor may file a complaint; therefore, it is immaterial whether that person is acting as a private citizen or for or on behalf of a public officer. *State v. Murphy*, 99 Idaho 511, 584 P.2d 1236 (1978).

Coroner's Inquisition.

Under the laws of this state, the inquisition of a coroner is not a sufficient basis for an information by the prosecutor, or to take the place of a complaint prescribed by this section. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

Duty of Arresting Officer.

Arresting officer has the right and the duty to determine the nature of the offense with which accused is to be charged. It is within his implied powers to carry into effect the statutory power to make the arrest. *Cornell v. Harris*, 60 Idaho 87, 88 P.2d 498 (1939).

Name of Defendant.

Defendant may be prosecuted at a preliminary examination under his own or a fictitious name, and same does not render examination void. If his true name is ascertained, it should be inserted. *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912).

Collateral References. 5 Am. Jur. 2d, Arrest, § 1 et seq.

6A C.J.S., Arrest, § 1 et seq.

22 C.J.S., Criminal Law, §§ 404 — 455.

Verification before whom. 16 A.L.R. 923.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial. 85 A.L.R.2d 980.

19-502. Definition of magistrate. — A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense. [Cr. Prac. 1864, § 100; R.S., R.C., & C.L., § 7510; C.S., § 8707; I.C.A., § 19-502.]

Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909); State v. Goerig, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

19-503. Who are magistrates. — The following persons are magistrates:

1. The justices of the Supreme Court.
2. The district judges.
3. Magistrates of the district court. [Cr. Prac. 1864, § 101; R.S., R.C., & C.L., § 7511; C.S., § 8708; I.C.A., § 19-503; am. 1972, ch. 35, § 1, p. 55.]

Compiler's notes. Section 2 of S.L. 1972, ch. 35 declared an emergency. Approved February 28, 1972.

Cited in: State v. Clark, 4 Idaho 7, 35 P. 710 (1900); Quinlan v. Glennon, 68 Idaho 282, 193 P.2d 403 (1948); In re Martz, 83 Idaho 72, 357 P.2d 940 (1960).

ANALYSIS

Coroner not magistrate.
Jurisdiction of magistrates.

Coroner Not Magistrate.

A coroner is not a magistrate and the finding of his inquest is not sufficient basis for information for homicide. In re Sly, 9 Idaho 779, 76 P. 766 (1904).

Jurisdiction of Magistrates.

Magistrates, as such, are given a special and fixed jurisdiction by the constitution and statutes. State v. Raaf, 16 Idaho 411, 101 P. 747 (1909).

19-504. Person lodging complaint. — When a complaint which has been subscribed to under oath by the party or parties lodging the same is laid before a magistrate alleging facts constituting the commission of a public offense, triable within the county, and the magistrate finds that the complaint alleges a public offense under the Idaho Code or county or city ordinance, the magistrate shall order the clerk of the court to file the complaint and refer the complaint to the appropriate county or city prosecuting attorney for further action. [Cr. Prac. 1864, § 102; R.S., R.C., & C.L., § 7516; C.S., § 8709; I.C.A., § 19-504; am. 1969, ch. 79, § 2, p. 230; am. 1998, ch. 91, § 1, p. 329.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S.L. 1998, ch. 91 is compiled as § 19-506.

Cited in: State v. Braithwaite, 3 Idaho 119, 27 P. 731 (1891); State v. Farris, 5 Idaho 666, 51 P. 772 (1897); State v. Hendricks, 80 Idaho 344, 330 P.2d 334 (1958); Clark v. Meehl, 98 Idaho 641, 570 P.2d 1331 (1977).

ANALYSIS

Complaint as deposition.
Sufficiency of information.

Complaint As Deposition.

In cases where no other depositions of witnesses are taken by the magistrate, the criminal complaint serves the dual purpose of commencing the prosecution and serving as a deposition upon which the warrant is issued. State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959); In re Martz, 83 Idaho 72, 357 P.2d 940 (1960).

Sufficiency of Information.

The state need not allege in the information that the complaint for acting as a real estate agent when unlicensed was filed within one year after the commission of the alleged offense since the docket certified by the probate judge acting as committing magistrate was

filed in the district court and such record showed the date the complaint was filed and warrant issued and contained a copy of the complaint, warrant of arrest and return thereon. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

19-505. Contents of complaint. — The complaint must set forth the facts stated by the complaining witness, tending to establish the commission of the public offense and the guilt of the defendant. [Cr. Prac. 1864, § 103; R.S., R.C., & C.L., § 7517; C.S., § 8710; I.C.A., § 19-505; am. 1969, ch. 79, § 3, p. 230.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Complaint, information or indictment need not negate statutory defenses to certain offenses, § 19-1433.

Cited in: *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

ANALYSIS

Complaint as deposition.
Establishment of probable cause.
Informal charge.
Probable cause hearing.
Sufficiency of information.

Complaint As Deposition.

In cases where no other deposition of witnesses are taken by the magistrate, the criminal complaint serves the dual purpose of commencing the prosecution and serving as a deposition upon which the warrant is issued. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959); *In re Martz*, 83 Idaho 72, 357 P.2d 940 (1960).

Establishment of Probable Cause.

Where an offense is one which allegedly took place in Idaho, it has ever been the law that an arrest warrant will only be issued by a magistrate upon his being satisfied that there is probable cause to believe that the named defendant has committed the offense complained of. *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Informal Charge.

No formal or detailed charge or description of offense is necessary in complaint before magistrate; all that is required is a general description or designation of offense so that defendant may be given a fair opportunity to know, by a proffered preliminary examination, the general character and outline of offense for which he is to have an examination. *State v. McGreevey*, 17 Idaho 453, 105 P. 1047 (1909); *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

Probable Cause Hearing.

Considering that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained indefinitely under the provisions of the prerequisite detention statutes, and that such a person is not a candidate for either a preliminary hearing or for a speedy trial in Idaho, such a person is entitled to the safeguard of a probable cause hearing. *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Sufficiency of Information.

The state need not allege in the information that the complaint for acting as a real estate agent when unlicensed was filed within one year after the commission of the alleged offense since the docket certified by the probate judge acting as committing magistrate was filed in the district court and such record showed the date the complaint was filed and warrant issued and contained a copy of the complaint, warrant of arrest and return thereon. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

19-506. When warrant may issue. — A magistrate may issue a warrant for the arrest of the defendant only after making a determination that there is probable cause to believe that an offense has been committed and that the defendant committed it. [Cr. Prac. 1864, § 104; R.S., R.C., & C.L., § 7518; C.S., § 8711; I.C.A., § 19-506; am. 1998, ch. 91, § 2, p. 329.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 1 of S.L. 1998, ch. 91 is compiled as § 19-504.

Cross ref. Warrant, summons, determination of probable cause, I.C.R. 4.

Cited in: State v. Hendricks, 80 Idaho 344, 330 P.2d 334 (1958).

ANALYSIS

Complaint as deposition.

Complaint by private citizen.

Full disclosure.

Probable cause.

Sufficiency of complaint or information.

Warrant not mandatory.

Complaint As Deposition.

In cases where no other deposition of witnesses are taken by the magistrate, the criminal complaint serves the dual purpose of commencing the prosecution and serving as a deposition upon which the warrant is issued. State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959); In re Martz, 83 Idaho 72, 357 P.2d 940 (1960).

Complaint by Private Citizen.

A warrant for arrest may issue upon a complaint filed upon information by a private citizen if the magistrate, after investigation, is satisfied that the offense has been committed. Clark v. Meehl, 98 Idaho 641, 570 P.2d 1331 (1977).

Full Disclosure.

Full disclosure to a magistrate is a defense to an action for malicious prosecution. The defense of full disclosure of the facts to a magistrate who issues the warrant is comparable to the defense of full disclosure to the prosecuting attorney, inasmuch as the statute provides for issuance to a magistrate of a warrant upon information given by a private citizen. Howard v. Felton, 85 Idaho 286, 379 P.2d 414 (1963).

Probable Cause.

Where defendant made full disclosure to the magistrate who issued a warrant on the advice of the prosecuting attorney, there was no showing of a lack of probable cause for such issuance such as was necessary to establish malicious prosecution. Howard v. Felton, 85 Idaho 286, 379 P.2d 414 (1963).

Where an offense is one which allegedly took place in Idaho, it has ever been the law that an arrest warrant will only be issued by

a magistrate upon his being satisfied that there is probable cause to believe that the named defendant has committed the offense complained of. Struve v. Wilcox, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Considering that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained indefinitely under the provisions of the prerequisite detention statutes, and that such a person is not a candidate for either a preliminary hearing or for a speedy trial in Idaho, such a person is entitled to the safeguard of a probable cause hearing. Struve v. Wilcox, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Sufficiency of Complaint or Information.

No formal or detailed charge or description of offense is necessary in complaint before magistrate. All that is required is general description or designation of offense so that defendant may be given fair opportunity to know by proffered preliminary examination general character and outline of offense for which he is to have examination. State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909); State v. Woodward, 41 Idaho 353, 238 P. 525 (1925).

The state need not allege in the information that the complaint for acting as a real estate agent when unlicensed was filed within one year after the commission of the alleged offense since the docket certified by the probate judge acting as committing magistrate was filed in the district court and such record showed the date the complaint was filed and warrant issued and contained a copy of the complaint, warrant of arrest and return thereon. State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959).

Warrant Not Mandatory.

By statute the issuance of the warrant is not mandatory as was interpreted by the justice of the peace and the prosecuting attorney. Instead the warrant should only be issued if the magistrate is satisfied that the offense complained of has been committed. Howard v. Felton, 85 Idaho 286, 379 P.2d 414 (1963).

Collateral References. Constitutionality of statute or ordinance authorizing arrest. 1 A.L.R. 585.

Habeas corpus, arrest of one discharged on. 62 A.L.R. 465.

Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest. 49 A.L.R.2d 1285.

19-507. Form of warrant. — A warrant of arrest is an order in writing, in the name of the state of Idaho, signed by a magistrate, commanding the arrest of the defendant, and may be substantially in the following form:

County of . . . , state of Idaho.

To any sheriff, constable, marshal, or policeman of said state, or of the county of . . . :

A complaint on oath, having this day been laid before me, by A.B., that the crime of (designating it) has been committed, and accusing C.D. thereof, you are therefore commanded forthwith to arrest the above named C.D. and bring him before me at (naming the place), or in the case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at . . . , this . . . day of . . . , . . . [Cr. Prac. 1864, § 105; R.S., R.C., & C.L., § 7519; C.S., § 8712; I.C.A., § 19-507; am. 2002, ch. 32, § 2, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 1 and 3 of S.L. 2002, ch. 32 are compiled as §§ 1-2312 and 19-1410, respectively.

Cited in: City of Sandpoint v. Butigan, 91 Idaho 855, 433 P.2d 125 (1967).

19-508. Additional requirements of warrant. — The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name. It must also state the time of issuing it, and the county, city, or town where it is issued, and be signed by the magistrate, with his name of office, and state the offense charged. [Cr. Prac. 1864, § 106; R.S., R.C., & C.L., § 7520; C.S., § 8713; I.C.A., § 19-508.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-509. To whom warrant directed. — The warrant must be directed to and executed by a peace officer. [Cr. Prac. 1864, § 107; R.S., R.C., & C.L., § 7521; C.S., § 8714; I.C.A., § 19-509.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court,

promulgated October 24, 1974, effective January 1, 1975.

Cited in: Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

19-510. Peace officers enumerated. — A peace officer is a sheriff of a county, or a constable, marshal, or policeman of a city or town. [Cr. Prac. 1864, § 108; R.S., R.C., & C.L., § 7522; C.S., § 8715; I.C.A., § 19-510.]

Cross ref. Department of law enforcement § 67-2901.

Idaho state police, § 67-2901 et seq.

Extraterritorial authority of peace officers, § 67-2337.

Cited in: Union Pac. R.R. v. Belek, 211 F. 699 (D. Neb. 1913); Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

ANALYSIS

Application.
Policemen.

Application.

Neither this section nor subdivision (d) of § 19-5101 apply to the relevant terms enumerated in subdivision (b) of § 18-4003. State v. Pratt, 125 Idaho 546, 873 P.2d 800 (1993).

Policemen.

Policemen are peace officers engaged in exercising governmental function of the city, hence they are employees of the city, not employees of chief of police. Klam v. Boehm, 72 Idaho 259, 240 P.2d 484 (1952).

If police officers are not appointed by chief of police he is not responsible for tortious acts committed by officers without his consent or knowledge. Klam v. Boehm, 72 Idaho 259, 240 P.2d 484 (1952).

Opinions of Attorney General. A court cannot simply appoint someone and call him or her a "marshal," thereby conferring peace officer status and enabling the person to carry a concealed weapon, serve arrest warrants, take custody of prisoners and secure courtrooms; however, if the sheriff cooperates with

the court, a marshal could be authorized to perform all the sheriff's court attendance duties, after being deputized by the sheriff. OAG 87-3.

It is the duty of the county sheriff to attend all courts located within his or her county. OAG 87-3.

Former § 31-3010 was not valid statutory authority for the appointment of special constables to serve as court attendants; the duties of court attendants, formerly split between sheriffs and constables, now rest solely with sheriffs, and if there are no constables, there can be no special constables to perform constable duties. Thus, in the few counties where "special constables" have been appointed to attend the court, they are acting without statutory authority, unless deputized by the sheriff or justified by exigent circumstances. OAG 87-3.

The office of constable is defunct, and the duty of attending court is now statutorily assigned to the sheriff; with the sheriff charged with these duties, the courts had no implied power under former § 31-3002 to appoint constables to attend to magistrate's courts. OAG 87-3.

The staff personnel provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants, nor are they recognized as peace officers; thus, they are not competent to perform the full range of security functions of court attendants. OAG 87-3.

There is no statutory authority for court appointment of bailiffs as court attendants. OAG 87-3.

19-510A. Peace officers' powers to employees of the state board of correction. — All employees of the state board of correction who receive certification from the Idaho peace officers standards and training advisory council shall have all the authority given by statutes to peace officers of the state of Idaho. All other classified employees designated by the board of correction pursuant to section 20-209C, Idaho Code, shall be empowered with the rights and duties of peace officers when engaged in transportation of prisoners or apprehension of prisoners or wards who have escaped, or apprehension and arrest of persons who are suspected of having violated the terms and conditions of their probation or parole. [I.C., § 19-510A, as added by 1973, ch. 170, § 1, p. 359; am. 1980, ch. 100, § 1, p. 220.]

Compiler's notes. Section 2 of S.L. 1973, ch. 170 is compiled as § 20-209C.

Sec. to sec. ref. This section is referred to in § 20-209C.

19-511. Railroad and steamboat police. — The governor of the state of Idaho is authorized and empowered, upon the application of any railroad or steamboat company to appoint and commission during his pleasure any person designated by such company to serve at the expense of such company as policeman, with the powers of a police officer, and who, after being duly

sworn, may act as such policeman upon the premises, cars or boats of such company. The company designating such person shall be responsible civilly for any abuse of his authority. Every such policeman shall, when on duty, wear in plain view a shield bearing the words, "railroad police" or "steamboat police," as the case may be, and the name of the company for which he is commissioned. [1909, p. 110, § 1; compiled and reen. C.L., § 7522a; C.S., § 8716; I.C.A., § 19-511.]

19-512. Direction to officers throughout state. — If a warrant is issued by a justice of the Supreme Court, judge of a District Court, probate judge, justice of the peace, or any other magistrate, it may be directed generally to any sheriff, constable, marshal or policeman in the state, and may be executed by any of those officers to whom it may be delivered. [Cr. Prac. 1864, § 109; R.S., R.C., & C.L., § 7523; C.S., § 8717; I.C.A., § 19-512; am. 1951, ch. 244, § 1, p. 516.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate courts and justice courts were abolished by S.L. 1969, ch. 100, § 1, which provided that wherever the words "probate judge" or "justice of the peace" appear they

shall mean the district judge or the magistrate of the district court, as the case may be.

The effect of this section is limited in part by § 19-503, which, as amended by S.L. 1972, ch. 35, § 1, p. 55, limits magistrates to justices of the Supreme Court, district judges and magistrates of the district court.

Section 2 of S. L. 1951, ch. 244 is compiled as § 19-514.

Cited in: Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

19-513. Direction to officers of county — Execution in other county.
[Repealed.]

Compiler's notes. This section, which comprised Cr. Prac. 1864, § 110; am. 1883, p. 7; reen. R.S., R.C., & C.L., § 7524; C.S.,

§ 8718; I.C.A., § 19-513, was repealed by S.L. 1951, ch. 244, § 3, p. 516.

19-514. Defendant to be taken before magistrate. — If the offense charged is a felony, the officer making the arrest must cause the defendant to be taken before the magistrate who issued the warrant, or in the case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon endorsed and subscribed by him, but all hearings on preliminary examinations must, as far as possible, be had before the magistrate most convenient to the majority of the witnesses for the prosecution, unless for good cause it is ordered to be held elsewhere, and in all such cases the preliminary examinations must be had as hereinafter provided, unless such person shall waive his right to such examination.

If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon the request of the defendant, take him before a magistrate in that county, who may admit him to bail in an amount which, in his judgment, will be reasonable and sufficient for the appearance of the defendant, and said magistrate must direct the defendant

to appear before the court or magistrate by whom the warrant was issued on or before a day certain which shall in no case be more than fourteen (14) days after such admittance to bail. If bail shall be forthwith given, the magistrate shall take the same and endorse thereon a memorandum of the aforesaid order for the appearance of the defendant. On taking of said bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer in charge of the defendant. The officer must then discharge the defendant from arrest, and must without delay, deliver the warrant and undertaking to the court at which the defendant is required to appear.

If bail is not forthwith given by the defendant, the officer must cause the defendant to be taken before the magistrate who issued the warrant, or in case of his absence or inability to act before the nearest and most accessible magistrate in the same county, and at the same time deliver to the magistrate the warrant with his return endorsed thereon. [Cr. Prac. 1864, §§ 111, 112; R.S., § 7525; am. 1899, p. 433, § 1; reen. R.C., § 7525; compiled and reen. C.L., § 7525; C.S., § 8719; I.C.A., § 19-514; am. 1951, ch. 244, § 2, p. 516; am. 2003, ch. 115, § 1, p. 358.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 1 of S.L. 1951, ch. 244 is compiled as § 19-512 and § 3 repealed § 19-513.

Section 4 of S.L. 1951, ch. 244 declared an emergency. Approved March 20, 1951.

Cross ref. County stenographers, employment, taking of preliminary examinations, § 31-2609.

Commitment on indictable offense upon plea of guilty to lower offense, § 19-3905.

Initial appearance before magistrate, I.C.R. 5.

ANALYSIS

Authority of magistrate.

False imprisonment.

Venue of examination.

Authority of Magistrate.

A magistrate has no authority or discretion to place conditions on refiling a criminal complaint dismissed at a preliminary hearing. *State v. Diaz*, 117 Idaho 392, 788 P.2d 207 (1990).

False Imprisonment.

Where circumstances justify reasonable de-

lay, officer is not guilty of false imprisonment for failing to take prisoner promptly before magistrate. *Madsen v. Hutchison*, 49 Idaho 358, 290 P. 208 (1930).

Venue of Examination.

One accused of crime can not insist upon examination before a magistrate of precinct in which the crime is charged to have been committed, but prosecuting attorney may designate precinct where, and magistrate before whom, the examination will be had. *State v. Griffin*, 4 Idaho 462, 40 P. 58 (1895).

Person arrested for crime is entitled to be taken for his preliminary examination before magistrate who issued warrant of arrest, unless there is some reason to the contrary that can be made to appear. *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Collateral References. Officers' immunity from criminal arrest. 1 A.L.R. 1156.

Who may take affidavit as basis for warrant of arrest. 16 A.L.R. 923.

Unlawful arrest as bar to prosecution under subsequent indictment or information. 56 A.L.R. 260.

Right to try one brought within jurisdiction illegally or as a result of a mistake as to identity. 165 A.L.R. 947; 25 A.L.R. 4th 157; 28 A.L.R. Fed. 685.

19-515. No unnecessary delay — Attorney may visit defendant. — The defendant must in all cases be taken before the magistrate without unnecessary delay, and any attorney at law entitled to practice in courts of record of the state of Idaho may, at the request of the prisoner after such

arrest, visit the person so arrested. [Cr. Prac. 1864, § 116; R.S., R.C., & C.L., § 7529; C.S., § 8720; I.C.A., § 19-515.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: Archbold v. Huntington, 34 Idaho 558, 201 P. 1041 (1921); State v. Boykin, 40 Idaho 536, 234 P. 157 (1925); Madsen v. Hutchison, 49 Idaho 358, 290 P. 208 (1930); Gawron v. Roberts, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987).

ANALYSIS

Consultation with attorney.

Delay justified.

Investigatory proceedings.

Unnecessary delay.

Consultation with Attorney.

A person arrested is entitled to consult with an attorney if requested. Anderson v. Foster, 73 Idaho 340, 252 P.2d 199 (1953).

Delay Justified.

Where circumstances justify reasonable delay, officer is not guilty of false imprisonment for failing to take prisoner promptly before magistrate. Madsen v. Hutchison, 49 Idaho 358, 290 P. 208 (1930).

Intoxication of arrested person justifies delay in arraignment before a magistrate, but if evidence as to intoxication is in conflict, intoxication is for the jury. Anderson v. Foster, 73 Idaho 340, 252 P.2d 199 (1953).

19-516. Complaint to be transmitted to magistrate. — If the defendant is brought before a magistrate other than the one who issued the warrant, the complaint upon which the warrant was issued must be sent to that magistrate, or, if such complaint can not be procured, the complaining witness must be summoned to lodge a new complaint before such magistrate. [Cr. Prac. 1864, § 118; R.S., R.C., & C.L., § 7531; C.S., § 8722; I.C.A., § 19-516; am. 1969, ch. 79, § 4, p. 230.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Complaint as deposition.

Sufficiency of information.

Investigatory Proceedings.

Defendant had no right to counsel before deciding to submit to a blood alcohol concentration test. This section provides a person who is arrested with the right to visit with an attorney upon request; however, nothing in its language implies that the arrested person's right to counsel should be extended beyond any safeguard provided under the sixth amendment securing an accused's right to counsel during critical stages of a criminal proceeding; this protection does not extend to investigatory proceedings. McNeely v. State, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Unnecessary Delay.

Defendant could not complain of unnecessary delay when officer did not arrive in town until 5:30 in the evening and took defendant before magistrate following morning, especially where defendant waived preliminary examination. State v. Behler, 65 Idaho 464, 146 P.2d 338 (1944).

Issue of reasonable time for taking arrested person before a magistrate is for the court if illegality of detention is clearly established, but if evidence is in conflict it is an issue for the jury to determine. Anderson v. Foster, 73 Idaho 340, 252 P.2d 199 (1953).

An arresting officer is liable for unreasonable delay in taking arrested person to magistrate, but is not liable for confinement after arrested person is brought before a magistrate. Anderson v. Foster, 73 Idaho 340, 252 P.2d 199 (1953).

Complaint as Deposition.

In cases where no other depositions of witnesses are taken by the magistrate, the criminal complaint serves the dual purpose of commencing the prosecution and serving as a deposition on which the warrant is issued. State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959); In re Martz, 83 Idaho 72, 357 P.2d 940

Sufficiency of Information.

The state need not allege in the information that the complaint for acting as a real estate

agent when unlicensed was filed within one year after the commission of the alleged offense since the docket certified by the probate judge acting as committing magistrate was filed in the district court and such record

showed the date the complaint was filed and warrant issued and contained a copy of the complaint, warrant of arrest and return thereon. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

19-517. Offenses triable in another county — Proceedings. —

When a complaint is laid before a magistrate of the commission of a public offense, triable in another county of the state, but showing that defendant is in the county where the complaint is laid, the same proceedings must be had as prescribed in this chapter, except that the warrant must require the defendant to be taken before the magistrate most accessible to the witnesses for the prosecution, but in the county in which the offense is triable, and the complaint must be delivered by the magistrate to the officer to whom the warrant is delivered. [Cr. Prac. 1864, § 117; R.S., R.C., & C.L., § 7530; C.S., § 8721; I.C.A., § 19-517; am. 1969, ch. 79, § 5, p. 230.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-518. Duties of officer. — The officer who executes the warrant must take the defendant before the magistrate most accessible to the witnesses for the prosecution, but in the county in which the offense is triable, and must deliver to him the complaint and the warrant, with his return indorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself. [Cr. Prac. 1864, § 119; R.S., R.C., & C.L., § 7532; C.S., § 8723; I.C.A., § 19-518; am. 1969, ch. 79, § 6, p. 230.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Failure to Request Notice.

Absent a specific request by the prosecutor, defendant was not required to give notice of an alibi defense and the trial judge erred in ruling that no alibi testimony would be allowed. *State v. Mata*, 106 Idaho 184, 677 P.2d 497 (Ct. App. 1984).

19-519. Notice of defense of alibi. — (1) At any time after arraignment before a magistrate upon a complaint and upon written demand of the prosecuting attorney, the defendant shall serve, within ten (10) days or at such different time as the court may direct, upon the prosecuting attorney, a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Within ten (10) days after receipt of the defendant's notice of alibi but in no event less than ten (10) days before trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the prosecution intends to rely to establish the defendant's

presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(3) If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subsection (1) or subsection (2) of this section, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(4) Upon the failure of either party to comply with the requirements of this section, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This section shall not limit the right of the defendant to testify in his own behalf.

(5) For good cause shown the court may grant an exception to any of the requirements of subsections (1) through (4) of this section. [I.C., § 19-519, as added by 1978, ch. 301, § 1, p. 758.]

Sec. to sec. ref. This section is referred to in I.C.R. 12.1.

ANALYSIS

New trial.

Written notice required.

New Trial.

District court's frustration with defendant's persistently untimely and defective discovery responses was understandable, but the exclusion of all of defendant's alibi witnesses was not necessary in order to rectify an address

error for an alibi witness where the State was able to interview all of the witnesses; thus, the district court exceeded the bounds of its discretion by imposing the extreme sanction of witness exclusion, the error was not harmless, the appellate court remanded the case for a new trial. *State v. Albert*, 138 Idaho 284, 62 P.3d 208 (Ct. App. 2002).

Written Notice Required.

Written notice of an alibi is required under this section. *Medina v. State*, 132 Idaho 722, 979 P.2d 124 (Ct. App. 1999).

CHAPTER 6

ARREST, BY WHOM AND HOW MADE

SECTION.

- 19-601. Arrest defined.
- 19-602. Arrest, how made.
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- 19-604. When private person may arrest.
- 19-605. Magistrate may order arrest.
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- 19-608. Information to person arrested.
- 19-609. Warrant must be shown.
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SECTION.

- 19-615. Procedure upon arrest without warrant.
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- 19-621. Authority to establish road blocks.
- 19-622. Minimum requirements.
- 19-623. Penalty.
- 19-624. Arrest with certified copy of warrant.
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19-601. Arrest defined. — An arrest is taking a person into custody in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person. [Cr. Prac. 1864, §§ 121, 122; R.S., R.C., & C.L., § 7538; C.S., § 8724; I.C.A., § 19-601.]

Cross ref. Illegal arrest, search or seizure, § 18-703.

Warrant, summons, determination of probable cause, I.C.R. 4.

ANALYSIS

Citizen's arrest.

Place of arrest.

Placing in police custody.

Citizen's Arrest.

Where, when defendant voluntarily got out of his car to answer an inquiry by a private security guard, he was unsteady on his feet, had an odor of alcohol on his breath, and exhibited slurred speech, and where upon observing defendant in this condition the security guard took defendant's keys and called the police to further deal with the situation, the security guard did not restrain defendant or take him into custody, and although it was his intention to make a citizen's arrest, no such arrest was effectuated by the guard as, *inter alia*, defendant was free to leave the scene on foot. State v. Thomas, 116 Idaho 848, 780 P.2d 599 (Ct. App. 1989).

Place of Arrest.

In his order denying the writ of habeas corpus, the trial judge found that the arrest took place in Bannock County. As this finding was supported by substantial, competent evidence it would not be disturbed on appeal. Smith v. State, 87 Idaho 163, 391 P.2d 849 (1964).

Placing in Police Custody.

The critical act in effecting an arrest is placing the person in police custody. State v. Hobson, 95 Idaho 920, 523 P.2d 523 (1974).

Where police officer, on the basis of an

anonymous phone call, stopped defendant and asked to see his driver's license but did not evidence any intent to place defendant in custody at that time, even though a number of other officers were present, there was no arrest as there was no action or intent evidencing police custody. State v. Hobson, 95 Idaho 920, 523 P.2d 523 (1974).

An arrest occurs only after there has been some action or intent evidencing police custody. State v. Post, 98 Idaho 834, 573 P.2d 153 (1978), overruled on other grounds, State v. Bottelton, 102 Idaho 90, 625 P.2d 1093 (1981).

Collateral References. 5 Am. Jur. 2d, Arrest, § 1 et seq.

6A C.J.S., Arrest, § 1 et seq.

Privilege of party, witness, or attorney, while going to, attending, or returning from court as extending to privilege from arrest for crime. 74 A.L.R.2d 592.

Police officer's power to enter private house or enclosure to make arrest, without warrant, for a suspected misdemeanor. 76 A.L.R.2d 1432.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial. 85 A.L.R.2d 980.

Private person's authority, in making arrest for felony, to shoot or kill alleged felon. 32 A.L.R.3d 1078.

Modern status of rules as to right to forcefully resist illegal arrest. 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest. 77 A.L.R.3d 281.

Right of peace officer to use deadly force in attempting to arrest fleeing felon. 83 A.L.R.3d 174.

Peace officer's liability for death or personal injuries caused by intentional force in arresting misdemeanant. 83 A.L.R.3d 238.

19-602. Arrest, how made. — An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. [Cr. Prac. 1864, §§ 125, 126; R.S., R.C., & C.L., § 7539; C.S., § 8725; I.C.A., § 19-602.]

ANALYSIS

Citizen's arrest.

Communication of officer's intent.

Evidence.

False arrest.

Placing in police custody.

Unnecessary force.

Waiver.

Citizen's Arrest.

Where, when defendant voluntarily got out of his car to answer an inquiry by a private security guard, he was unsteady on his feet, had an odor of alcohol on his breath, and

exhibited slurred speech, and where upon observing defendant in this condition the security guard took defendant's keys and called the police to further deal with the situation, the security guard did not restrain defendant or take him into custody, and although it was his intention to make a citizen's arrest, no such arrest was effectuated by the guard as, *inter alia*, defendant was free to leave the scene on foot. State v. Thomas, 116 Idaho 848, 780 P.2d 599 (Ct. App. 1989).

Communication of Officer's Intent.

If an arrest is made on warrant charging party with commission of offense outside

presence of arresting officer and not immediately after commission of offense, the officer must inform the arrested party of his intention to make arrest, cause of arrest, and his authority to make arrest, if so requested by arrested party. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Evidence.

Jury was justified in finding police officer guilty of false arrest even though he had a warrant for arrest of plaintiff on charge of assault and battery where evidence showed that officer did not show the warrant, or advise her of his reason for making arrest even though she requested same, and upon her refusal to submit voluntarily proceeded to use force in making arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

While there is no single piece of information set forth in the affidavit that is conclusive, considering the totality of the circumstances, the affidavit contained sufficient information to establish the probable cause necessary for issuance of the search warrant. *State v. Howard*, 135 Idaho 727, 24 P.3d 44 (2001).

False Arrest.

In action for damages for false arrest it was not error for trial court to strike from evi-

dence the criminal complaint issued out of police court, if action was not based on absence of authority to make arrest, but the manner in which the arrest was made. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Placing in Police Custody.

The critical act in effecting an arrest is placing the person in police custody. *State v. Hobson*, 95 Idaho 920, 523 P.2d 523 (1974).

Unnecessary Force.

An officer in making an arrest though legal is guilty of assault and battery, if he uses unnecessary and excessive force. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Waiver.

One who pleads guilty to criminal charge following unlawful arrest does not waive right to sue arresting officer for damages for unlawful arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Collateral References. Warrant to search as necessary to justify search and seizure incident to lawful arrest. 32 A.L.R. 680; 51 A.L.R. 424; 74 A.L.R. 1387; 82 A.L.R. 782.

19-603. When peace officer may arrest. — A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he has committed a felony.
6. When upon immediate response to a report of a commission of a crime there is probable cause to believe, that the person arrested has committed a violation of section 18-902 (assault), 18-903 (battery), 18-918 (domestic assault or battery), 18-7905 (first degree stalking), 18-7906 (second degree stalking), 39-6312 (violation of a protection order), or 18-920 (violation of a no contact order).
7. When there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer upon immediate response to a report of a commission of a crime aboard an aircraft, that the person arrested has committed such a crime. [Cr. Prac. 1864, §§ 131, 133; R.S., R.C., & C.L., § 7540; C.S., § 8726; I.C.A., § 19-603; am. 1979, ch. 307, § 1, p. 832; am. 1988, ch. 271, § 1, p. 901; am.

1994, ch. 318, § 1, p. 1019; am. 1997, ch. 89, § 1, p. 214; am. 1997, ch. 314, § 4, p. 929; am. 2004, ch. 337, § 5, p. 1007.]

Compiler's notes. This section was amended by two 1997 acts — ch. 89, § 1 and ch. 314, § 4, both effective July 1, 1997 — which appear to be compatible and have been compiled together.

The amendment by ch. 89, § 1 in paragraph 6., deleted “at the scene of a domestic disturbance there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer” following “When”, deleted “such” following “to a report of a commission of” and inserted “there is probable cause to believe” preceding “, that a person arrested”.

The amendment by ch. 314, § 4 in paragraph 6. added “, or 18-1920 (violation of a no contract order).” at the end of the paragraph.

The words enclosed in parentheses so appeared in the law as enacted.

Section 3 of S.L. 1997, ch. 314 is compiled as § 18-922.

Section 4 of S.L. 2004, ch. 337 is compiled as § 18-7906.

Section 2 of S.L. 1988, ch. 271 declared an emergency. Approved March 31, 1988.

Cross ref. Arrest with certified copy of warrant, § 19-624.

Coroner to perform duties of sheriff when sheriff disqualified due to conflict of interest, § 31-2806.

Duty of sheriff to make arrests, § 31-2202.

Fire wardens, authority to make arrests, § 38-133.

Liquor law enforcement officers, power to serve and execute warrants of arrest, § 23-807.

Sheriff's fee for executing order of arrest, § 31-3203.

Cited in: Union Pac. R.R. v. Belek, 211 F. 699 (D. Neb. 1913); State v. Anderson, 31 Idaho 514, 174 P. 124 (1918); Sima v. Skaggs Payless Drug Center, Inc., 82 Idaho 387, 353 P.2d 1085 (1960); State v. Crabb, 107 Idaho 298, 688 P.2d 1203 (Ct. App. 1984); State v. Moore, 111 Idaho 854, 727 P.2d 1282 (Ct. App. 1986); State v. Griffiths, 113 Idaho 364, 744 P.2d 92 (1987); State v. Wren, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989); State v. Rodriguez, 115 Idaho 1096, 772 P.2d 734 (Ct. App. 1989); State v. Bowman, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993).

ANALYSIS

Appellate review.

Application.

Citizen's arrest.

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— Found.

— In general.

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— Detention.

Right of search.

Search incident to arrest.

Unnecessary force.

Waiver.

Appellate Review.

Standard of appellate review of arrest should be whether, at the time of the arrest, the police had possession of information which, viewed in light of practical considerations of everyday life, would lead an ordinarily prudent and cautious officer to believe — or to entertain an honest and strong suspicion — that defendant had committed a felony; the critical variables in applying this test are the point in time when the arrest occurred and the quantum of information possessed by the police at that point. The sufficiency of information must be tested at the time of the arrest itself. State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Application.

This section has no application to the question of the legitimacy of a stop in a drunk driving case, where the only question before the district is on a suppression motion. Any assertion by the defendant that probable cause is required to support the investigative stop is a misstatement of the law. State v. Knight, 128 Idaho 862, 920 P.2d 78 (Ct. App. 1996).

Citizen's Arrest.

Where, when defendant voluntarily got out of his car to answer an inquiry by a private security guard, he was unsteady on his feet, had an odor of alcohol on his breath, and exhibited slurred speech, and where upon observing defendant in this condition the security guard took defendant's keys and called the police to further deal with the situation, the security guard did not restrain defendant or take him into custody, and although it was his intention to make a citizen's arrest, no such arrest was effectuated by the guard as, *inter alia*, defendant was free to leave the scene on foot. State v. Thomas, 116 Idaho 848, 780 P.2d 599 (Ct. App. 1989).

Concealed Weapons.

Where police officer discovered defendant had pistol concealed on his person when officer started to search latter for a black jack which defendant had admitted carrying, defendant was guilty of offense of carrying concealed weapon committed in presence of officer so as to authorize arrest without warrant. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).

A motion to suppress evidence was properly denied where defendant was lawfully arrested without warrant for carrying concealed weapons and weapons were properly seized. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).

Construction.

This section must be construed in pari materia with § 19-4804 (now § 67-2905) where arrest is made by state highway patrolman, since § 19-4804 was enacted after it was. *Smith v. Lott*, 73 Idaho 205, 249 P.2d 803 (1952).

Section 49-1407, which provides the authority for arrests in cases of traffic violations, narrows the broader arrest authority contained in this section. *Tanner v. Heise*, 879 F.2d 572 (9th Cir. 1989).

Domestic Disturbance Arrest.

The fact that officers cited defendant for domestic battery, addressed under subsection (6) of this section, did not render the other subsections of this arrest statute facially inapplicable and did not require that his arrest must have been made at the scene of the domestic disturbance; objective assessment of the facts gave deputies reasonable cause for warrantless felony arrest under subsection (3) of this section (decided prior to amendment by ch. 89, § 1). *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

Evidence.

Where police took knife away from defendant accused of robbery after victim gave details of crime and description of defendant, knife was properly admitted into evidence. *State v. Robinson*, 71 Idaho 290, 230 P.2d 693 (1951).

In action for damages for false arrest it was not error for trial court to strike from evidence the criminal complaint issued out of police court, if action was not based on absence of authority to make arrest, but the manner in which the arrest was made. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Habeas Corpus.

Habeas corpus is not available to challenge the legality of an arrest or the admissibility of illegally seized evidence. *O'Neill v. State*, 92 Idaho 885, 452 P.2d 989 (1969).

"Hot Pursuit."

Numerous Idaho cases have listed "hot pursuit" among the exceptions to the warrant requirement; however, many of these listings have been boilerplate recitals. Where hot pursuit has played a part in a decision, it usually has been qualified by a reference to the danger posed by the offender, to the potential destruction of evidence, or to the possibility of escape. *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989).

Illegal Arrest.

Instruction that one illegally arrested may initiate and has right to use force to free himself is properly refused as such force is only justified when necessary. *State v. Autheman*, 47 Idaho 328, 274 P. 805, 62 A.L.R. 195 (1929).

Jury was justified in finding police officer guilty of false arrest even though he had a warrant for arrest of plaintiff on charge of assault and battery where evidence showed that officer did not show the warrant, or advise her of his reason for making arrest even though she requested same, and upon her refusal to submit voluntarily proceeded to use force in making arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Where plaintiff was not informed of defendant's intention to arrest her, of the cause of the arrest, nor defendant's authority to make it, and was not taken without delay to the nearest and most accessible magistrate in the county where the arrest was made and while the offense was allegedly committed in defendant's presence he did not make the arrest until several hours thereafter nor did he obtain a warrant during the interval and where the court before which plaintiff was eventually taken had no jurisdiction, plaintiff's civil rights under state law were violated. *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

Investigative Stop.

Any investigative stop necessarily involves a brief period of detention and a suspect cannot defeat the purpose of a stop simply by walking away from it; neither is an investigative stop necessarily converted to an arrest if the police draw weapons since the police are entitled to take reasonable precautions for their own safety and to make a reasonable show of force necessary to effectuate the stop. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Where police had adequate grounds to conduct an investigative stop and when the stop occurred, defendant attempted to walk away from the scene and the police, with weapons drawn, ordered him to halt and to return, such detention by the police was within the permissible scope of the investigative stop. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

An investigative stop will ripen into an arrest, which must then be supported by reasonable cause, if the detention becomes overly intrusive; accordingly, an arrest is deemed to have occurred, and must be tested against the requirement of reasonable cause, when the actions of the police go beyond those authorized for an investigative stop. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Offense in Presence of Officer.

A deputy sheriff had sufficient facts within his knowledge to make an arrest where upon being informed that the offense of drunken operating of a motor vehicle had been committed, such operator actually committed the offense in the presence of the officer, the operator starting his motor and spinning the wheels of the vehicle in an effort to move the car out of the borrow pit into which he had gone off the road, being driven within the meaning of the statute. *State v. Parker*, 81 Idaho 51, 336 P.2d 318 (1959).

Where police officer was in the process of obtaining warrant to arrest defendant for disturbing peace, but after few minutes realized that he did not need one when the offense was committed in his presence, such conduct was reasonable and prompt although it was not the most desirable. *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, *State v. Tucker*, 95 Idaho 4, 539 P.2d 556 (1975).

It is not necessary under subsection (3) of this section that the felony be committed in the presence of the arresting officer. The statute also authorizes an arrest based upon a request from other police officers if the officer requesting the arrest has probable cause to believe that the arrestee committed a felony. *State v. Oakley*, 119 Idaho 1006, 812 P.2d 313 (Ct. App. 1991).

Officers' Discretion and Duty.

Peace officer has the right and duty to determine what criminal charge should be lodged against accused. He has such powers as are necessary to the effectual execution of the powers given him by law. *Cornell v. Harris*, 60 Idaho 87, 88 P.2d 498 (1939).

If an arrest is made on warrant charging party with commission of offense outside presence of arresting officer and not immediately after commission of offense the officer must inform the arrested party of his intention to make arrest, cause of arrest, and his authority to make arrest, if so requested by arrested party. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Despite the use of the word "may," the statute imposes a duty on peace officers to make arrests. *Monson v. Boyd*, 81 Idaho 575, 348 P.2d 93 (1959).

Police officers did not have control over

vehicle of driver who was taken to hospital by police officers after being struck in the nose by bouncer at local bar where doctor who treated driver told officers that driver was too intoxicated to drive and officers advised driver not to drive and to have someone pick him up and take him home, since neither subsection (1) of this section, § 50-209 nor § 49-205(3) imposes a duty on a police officer to arrest an intoxicated person who possesses the keys to a vehicle the person might drive, and who has not committed some other crime for which the officer might arrest the person, they were not liable in tort to person injured when driver attempted to drive himself in the vehicle after officers had returned his keys to him and departed. *Olguin v. City of Burley*, 119 Idaho 721, 810 P.2d 255 (1991).

Reasonable Inferences.

In determining whether there is probable cause for an arrest, an officer is entitled to draw reasonable inferences from the available information in light of the knowledge that he has gained from his previous experience and training. *State v. Kysar*, 116 Idaho 992, 783 P.2d 859 (1989).

Where police officer, after stopping defendant's automobile, noticed that defendant's eyes were glazed and bloodshot, his speech was slightly slurred and his breath smelled of alcohol, and where the officer also noted that defendant had a tail light out, crossed the fog line twice, and admitted to have had three beers to drink, these facts established probable cause to arrest defendant and to request that he submit to a blood-alcohol test. *State v. Armbruster*, 117 Idaho 19, 784 P.2d 349 (Ct. App. 1989).

—Found.

An automobile with out-of-town license plates moving slowly in the early morning, in a residential district, in the immediate vicinity of a building where a burglary which police officers were investigating had taken place a few minutes before, and a passenger getting out, apparently furtively throwing something away, and returning to the car were circumstances sufficient to justify an arrest by such police officers without a warrant under subsection 3 of this section. *State v. Loyd*, 92 Idaho 20, 435 P.2d 797 (1967).

Defendant's arrest for illegal possession of marijuana was based on reasonable cause within the meaning of this section where officers observed what appeared to be the preliminaries of a sale of marijuana by defendant to an informer; where the informer, whom the officers knew from past occasions to be reliable, told them he had purchased the marijuana from defendant; and where the marijuana had been delivered by the informer to the officers shortly after its purchase in a paper sack similar to one the officers had

observed defendant carrying during their surveillance of him. *State v. Segovia*, 93 Idaho 594, 468 P.2d 660 (1970).

Where police received anonymous call that marijuana was growing in backyard of a residence, and they ascertained name of person from city directory, observed cultivated and freshly watered marijuana in yard, observed sports car behind house and lights on in house, there was reasonable cause to believe defendant had committed a crime and was at home. *State v. Pontier*, 95 Idaho 707, 518 P.2d 969 (1974).

Where the police were informed of an armed robbery and were aware that, just before the robbery, a man fitting defendant's general description had been seen in the vicinity wearing a heavy coat, despite the warm weather, and what appeared at that time to be a stocking cap and where, when stopped, the defendant attempted to leave the scene and, when ordered to return, was seen to have what then appeared to be a ski mask protruding from his back pocket, these facts, considered together and viewed in light of practical considerations of everyday life, would lead an ordinarily prudent and cautious police officer to believe, or to entertain an honest and strong suspicion, that defendant had participated in the reported robbery; consequently, the arrest of defendant was supported by reasonable cause and the search of his pocket was valid. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Where a Nevada highway patrol officer observed defendant driving in Nevada towards the Idaho border in a weaving manner, and the officer followed defendant into Idaho where he stopped him and detained him until Idaho State Patrolman arrived at the scene, and the Idaho officer testified that defendant appeared to be inebriated and so he took him into custody and took him to sheriff's office, where he was administered a field sobriety test which he failed, the warrantless arrest made by the Idaho officer was legal as he had reasonable cause to believe defendant was driving under the influence. *State v. Ruhter*, 107 Idaho 282, 688 P.2d 1187 (1984).

Where having obtained a warrant, the sheriff led a contingent of law enforcement officers upon a search for marijuana at the home of defendants and when the officers arrived, defendant met them outside, near their vehicles and after they showed him the search warrant, they handcuffed him and detained him in a police car while the search was conducted and some 90 minutes later, advised him that he was under arrest, if the search warrant was founded upon probable cause, the detention was permissible. *State v. Schaffer*, 107 Idaho 812, 693 P.2d 458 (Ct. App. 1984).

Although the deputy had no authority to

make a warrantless arrest for misdemeanor offenses committed outside his presence, he was authorized to issue a citation as provided in § 19-3901 where he had probable cause, based on a citizen's eyewitness account, that the defendant had violated one or more misdemeanor statutes regulating the operation of boats. *State v. Simpson*, 112 Idaho 644, 734 P.2d 669 (Ct. App. 1987).

Where the officer was dispatched to investigate a report of suspicious activities by three men at a public rest room, the officer's way into the rest room was temporarily blocked by one of the individuals, after the officer entered, he found two other persons conversing inside a doorless toilet stall, one of the men dropped a syringe, and the officer observed track marks on the defendant's arms as well as a cut-off soda pop can with a singed bottom, the officer had probable cause to arrest the defendant for possession of drug paraphernalia and the discovery of heroin, during a search incident to the arrest, was lawful. *State v. Montague*, 114 Idaho 319, 756 P.2d 1083 (Ct. App. 1988).

If an officer observes a marijuana pipe in plain view, in actual or constructive possession of a person, he has probable cause to arrest that individual for violating § 37-2734A. *State v. Chambliss*, 116 Idaho 988, 783 P.2d 327 (Ct. App. 1989).

Where surveillance established that defendant routinely met with drug dealer immediately prior to the scheduled times for cocaine sales, where on one occasion outside of drug dealer's residence, an officer observed defendant discreetly passing a small object to drug dealer, and where defendant was driver to drug dealer on the occasion of one cocaine sale, the succession of superficially innocent events had proceeded to a point where a prudent man could say that an innocent course of conduct was substantially less likely than a criminal one. *State v. Rubio*, 115 Idaho 873, 771 P.2d 537 (Ct. App. 1989), cert. denied, 117 Idaho 509, 788 P.2d 1332 (1990).

Where the lawful search of defendant's residence and other buildings on the property revealed a quantity of marijuana, indicating that one or more felonies had been committed, the officers clearly had reasonable cause to believe that defendant, who resided on the premises, committed a felony, and where they then communicated this information to the officers at the police station, those officers were authorized to arrest defendant. *State v. Oakley*, 119 Idaho 1006, 812 P.2d 313 (Ct. App. 1991).

Though defendant did not touch the officers, he placed himself in the path of the officers, forcing them to push him out of the way. Defendant ignored the officers' repeated verbal requests to move away. He placed himself unnecessarily close to the officers and

made hand gestures in front of their faces. These facts are sufficient to establish probable cause for defendant's arrest. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

While attempting to stop the vehicle, the officer observed that all three occupants were moving excessively about the interior of the car for a period before the driver finally brought the vehicle to a stop. From this excessive activity, followed by the discovery of drugs in the automobile, an officer could reasonably infer that all of the occupants had been taking steps to conceal the contraband in the car, and this evidence, together with defendant's physical position on the seat next to the backpack, would lead a prudent person to entertain an honest and strong suspicion that defendant had knowledge and control of the contraband in the backpack; and although this evidence might have been insufficient to convict defendant for possession of the drugs in the backpack, it was adequate to create probable cause for his arrest. *State v. Zentner*, 134 Idaho 508, 5 P.3d 488 (Ct. App. 2000).

—In General.

Reasonable cause exists for an arrest in daylight without warrant on a charge where there is such a state of facts as would lead man of ordinary care and prudence to believe or entertain honest and strong suspicion that such person is guilty. *State v. Autheman*, 47 Idaho 328, 274 P. 805, 62 A.L.R. 195 (1929).

Officer is not required to satisfy himself beyond question that felony has been committed. *State v. Autheman*, 47 Idaho 328, 274 P. 805, 62 A.L.R. 195 (1929).

Whether or not officer had probable cause for arrest is generally a question for jury. *State v. Autheman*, 47 Idaho 328, 274 P. 805, 62 A.L.R. 195 (1929); *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934).

Reasonable cause to believe that accused has committed a felony is the test of the officer's right to arrest under this provision. *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934); *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

The definition of "reasonable cause" is the possession of such information on the part of the arresting officer as would lead a man of ordinary care and prudence to believe or entertain honest and strong suspicion that a felony had been committed by appellant. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

Generally, an officer may, without a warrant, arrest a person whom he has probable cause to believe guilty of a felony. Probable cause must, in this connection, mean reasonable ground of presumption that the charge is, or may be, well founded. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

A warrantless arrest based upon a request from a fellow police officer is legal only if the officers initially requesting the arrest had probable cause to believe that the arrestee had committed a crime. *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978).

Probable cause does not require an officer to compile an ironclad case against a suspect, rather, it deals with the probable consequences of all facts considered as a whole. *State v. Alger*, 100 Idaho 675, 603 P.2d 1009 (1979).

In reviewing a police officer's determination of reasonable cause in the field, courts will take into account the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Where the arresting officer's information came in part from the police radio, reasonable cause must be tested upon the full information in police possession which caused the radio messages to be sent, not merely upon the messages themselves. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

An attempt to leave the scene of the investigative stop is an important factor, though not in itself dispositive, in determining reasonable cause for arrest; particularized suspicion, when combined with an attempt to avoid an investigative stop, may constitute adequate grounds for a finding of reasonable cause. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Reasonable or probable cause has been defined as information that would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that such person is guilty. *State v. Alger*, 100 Idaho 675, 603 P.2d 1009 (1979); *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Where the objective evidence showed that probable cause existed to arrest the defendant and that an arrest occurred at the time the defendant was initially confronted, the detective's subjective doubts concerning probable cause were not material. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Reasonable or probable cause for an arrest exists where the officers possess information that would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

The fact that defendant turned around and ran gave the officers an additional basis under which they had probable cause to arrest him. *State v. Quimby*, 122 Idaho 389, 834 P.2d 906 (Ct. App. 1992).

Merely because driving without privileges is not included in the list of vehicular offenses in § 49-1405 does not negate an officer's abil-

ity to arrest, based on probable cause, for a violation of § 18-8001(1). *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

—Collective Knowledge Sufficient.

In possession of cocaine case, evidence of probable cause included drug dealer's incriminating statements concerning defendant even though the statements were not known to the arresting officers at the moment of his arrest; the arresting officers did not need to have personal knowledge of all the items of information used to assess the probable cause to arrest defendant, and the collective knowledge and information of all the officers involved in the investigation, when taken together, were sufficient to constitute probable cause. *State v. Rubio*, 115 Idaho 873, 771 P.2d 537 (Ct. App. 1989), cert. denied, 117 Idaho 509, 788 P.2d 1332 (1990).

Defendant maintained that he was not shown to have committed an offense in officer's presence, as required in this section, because the officer did not know of the suspension of defendant's driving privileges. However, the magistrate found it sufficient that officer saw defendant driving, inferred a license suspension from defendant's inability to produce a driver's license, and confirmed that inference sufficiently to establish probable cause with the teletype information relayed from dispatch. *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Ct. App. 1992).

—Detention.

A warrant to search a home for contraband, founded upon probable cause, implicitly carries with it a limited authority to detain occupants of the premises while a proper search is conducted. *State v. Schaffer*, 107 Idaho 812, 693 P.2d 458 (Ct. App. 1984).

Right of Search.

Where law enforcement officers, based upon information of alleged burglarious taking of the movie projector, stopped appellant's automobile and apprehended appellants which resulted in their being remitted to the custody of the sheriff, there being a large number of electrical appliances found in the car, since appellants were legally arrested, officer having reasonable cause for believing person arrested to have committed an offense, there was a right of search without search warrant. *State v. Polson*, 81 Idaho 147, 339 P.2d 510 (1959).

Search Incident to Arrest.

When police officer, during an investigative stop, reached into defendant's pocket, rather than conducting a "pat-down" search for weapons, the scope of a permissible investigative stop was exceeded; therefore, in this case, the time of the arrest — for the purpose of testing the existence of reasonable cause —

was coincident with the search itself. *State v. Cook*, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

Even if the detention warrant is invalid, it, like an arrest warrant that turns out to be defective, cannot invalidate an arrest where the police possess probable cause to make the arrest. Therefore, where the officers had reasonable cause to arrest the defendant at the time he was detained, and they also had authority, pursuant to subdivision 3 of this section, to make a warrantless arrest, the arrest was valid, and the roll of money found in the defendant's pocket was lawfully acquired in a search incident to that arrest. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Where police officers discovered cocaine and scales in the console of defendant's vehicle, after he was arrested for the misdemeanor charge of operating a motor vehicle without liability insurance, the Court of Appeals upheld the search and seizure of evidence as a search incident to arrest. *State v. Wheaton*, 121 Idaho 727, 827 P.2d 1174 (Ct. App. 1991).

Idaho Code § 49-1407(1) allowed officers to arrest when the officer had reasonable and probable grounds to believe the person would disregard a written promise to appear in court on misdemeanor traffic violations; thus, where pursuant to a violation defendant was stopped and had no driver's license, no proof of insurance, the registration defendant produced was for a different vehicle, and the vehicle's license plates were fictitious, the officer had grounds to arrest, and the search of defendant's vehicle incident to that arrest, which revealed methamphetamine, was upheld. *State v. Brown*, — Idaho —, 85 P.3d 683 (Ct. App. 2004).

Unnecessary Force.

An officer in making an arrest though legal is guilty of assault and battery, if he uses unnecessary and excessive force. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Waiver.

One, who pleads guilty to criminal charge following unlawful arrest, does not waive right to sue arresting officer for damages for unlawful arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Collateral References. Constitutionality of authority for arrest by peace officers without a warrant. 1 A.L.R. 585.

Entry and search of premises for re-arrest of escaped prisoner without warrant. 5 A.L.R. 273.

Peace officers' criminal responsibility for killing or wounding one whom they wished to identify. 18 A.L.R. 1368; 61 A.L.R. 321.

Territorial extent of power to arrest under warrant. 61 A.L.R. 377.

Extradition of escaped convict. 78 A.L.R. 419.

Information, belief or suspicion as to commission of felony as justification for arrest by

private person without warrant. 133 A.L.R. 608.

Mobs, liability for failure to prevent killing by. 60 A.L.R.2d 873.

19-604. When private person may arrest. — A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. [Cr. Prac. 1864, § 137; R.S., R.C., & C.L., § 7541; C.S., § 8727; I.C.A., § 19-604.]

ANALYSIS

In general.

In presence of private person.

Officer outside limits of his authority.

Officer outside of jurisdiction.

Officers.

Self-defense.

Unlawful arrest.

Valid arrest.

In General.

A private citizen, having statutory power under this section, may, likewise arrest at night without a warrant of arrest for a misdemeanor committed in his presence. *Sima v. Skaggs Payless Drug Center, Inc.*, 82 Idaho 387, 353 P.2d 1085 (1960).

In Presence of Private Person.

The act of stealing the property from its owner is not an element of theft by possession of stolen property under subsection (4) of § 18-2403. Therefore, it was not necessary that the employees observe the removal of items from their employer's loading dock in order to make a citizen's arrest. Under the circumstances where the employees saw defendant in possession of items that looked identical to those stored on employer's loading dock and when confronted defendant said he thought the items had been discarded which was an admission that the items had come from the loading dock the offense of theft by possession of stolen property was committed "in the presence" of the employees, and the court properly held that the employees had effectuated a valid citizen's arrest in compliance with this section. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

Officer Outside Limits of His Authority.

Although the officer who arrested and detained the defendant for driving under the influence of alcohol was outside the territorial limits of his authority, he was able to arrest, as private persons are, those committing the offense of driving under the influence and he

was a person authorized to make a request to submit to a blood-alcohol test. *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987).

Officer Outside of Jurisdiction.

Although outside of his jurisdiction at the time of the traffic stop, driver was on duty at that time, was dressed in his law enforcement uniform and badge, and was driving a marked law enforcement vehicle with an overhead light bar which he used to effectuate the stop. Therefore, he was acting as a law enforcement officer when he conducted the investigatory stop of defendant and an analysis of this section was inappropriate. *State v. Benefiel*, 131 Idaho 226, 953 P.2d 976 (1998), cert. denied, 525 U.S. 818, 119 S. Ct. 58, 142 L. Ed. 2d 45 (1998).

Officers.

Idaho has no case law which holds that a police officer who is acting as a police officer at the time of the arrest cannot make a citizen's arrest. *Laughlin v. State*, — Idaho —, 85 P.3d 1125 (Ct. App. 2003).

Self-Defense.

Where a citizen was killed while resisting a felony, which he had the right to do, the accused could not claim that he abandoned the attempt to commit the felony and shot in self-defense. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Unlawful Arrest.

Where plaintiff was not informed of defendant's intention to arrest her, of the cause of the arrest, nor defendant's authority to make it, and was not taken without delay to the nearest and most accessible magistrate in the county where the arrest was made and while the offense was allegedly committed in defendant's presence he did not make the arrest until several hours thereafter nor did he obtain a warrant during the interval and where the court before which plaintiff was eventu-

ally taken had no jurisdiction, plaintiff's civil rights under state law were violated. *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

Valid Arrest.

Given the defendant's conduct, the police officer's decision to defuse the situation by removing the parties from the scene and having the citizen's arrest completed at the police station was prudent; at the police station the private citizen completed the necessary documentation for the citizen's arrest and followed the requirements of § 19-608. The district court erroneously held that the police unlawfully arrested the defendant where the undisputed facts showed that the private citizen

made a valid citizen's arrest at the police station. *State v. Sutherland*, 130 Idaho 472, 943 P.2d 62 (Ct. App. 1997).

The defendant's arrest was a valid citizen's arrest and although the police officer conducted a warrantless search of the defendant's purse immediately after she had been placed under citizen's arrest by the private citizen, police officers may conduct a search of an arrestee incident to a citizen's arrest once the subject has been placed in their custody; as such the police officer's warrantless search of the defendant's purse was a proper search incident to an arrest. *State v. Sutherland*, 130 Idaho 472, 943 P.2d 62 (Ct. App. 1997).

19-605. Magistrate may order arrest. — A magistrate may orally order a peace officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate. [Cr. Prac. 1864, § 136; R.S., R.C., & C.L., § 7542; C.S., § 8728; I.C.A., § 19-605.]

19-606. Person arresting may summon assistance. — Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein. [Cr. Prac. 1864, § 123; R.S., R.C., & C.L., § 7543; C.S., § 8729; I.C.A., § 19-606.]

In General.

In civil action for false arrest in which it was argued alleged misdemeanor was not committed in presence of two defendants who took part in arrest, such action was justified where they were called on by person who had seen plaintiff's actions. *Sima v. Skaggs Payless Drug Center, Inc.*, 82 Idaho 387, 353 P.2d 1085 (1960).

Given the defendant's conduct, the police officer's decision to defuse the situation by removing the parties from the scene and having the citizen's arrest completed at the police station was prudent; at the police station the private citizen completed the necessary documentation for the citizen's arrest and followed the requirements of § 19-608. The district court erroneously held that the police unlawfully arrested the defendant where the undis-

puted facts showed that the private citizen made a valid citizen's arrest at the police station. *State v. Sutherland*, 130 Idaho 472, 943 P.2d 62 (Ct. App. 1997).

The defendant's arrest was a valid citizen's arrest and although the police officer conducted a warrantless search of the defendant's purse immediately after she had been placed under citizen's arrest by the private citizen, police officers may conduct a search of an arrestee incident to a citizen's arrest once the subject has been placed in their custody; as such the police officer's warrantless search of the defendant's purse was a proper search incident to an arrest. *State v. Sutherland*, 130 Idaho 472, 943 P.2d 62 (Ct. App. 1997).

Collateral References. Voluntary exposure to unnecessary danger by insured, by aiding peace officer. 17 A.L.R. 191.

19-607. When arrest may be made upon a warrant. — If the offense charged is a felony, the arrest may be made on any day, and at any time of the day or night. If the offense charged is a misdemeanor, the arrest shall not be made inside a person's residence between 8:00 p.m. and 8:00 a.m., unless upon the direction of the magistrate, as endorsed upon the warrant, or where consent was given to enter the residence by a person with real or apparent authority. [Cr. Prac. 1864, p. 124; R.S., R.C., & C.L., § 7544; C.S., § 8730; I.C.A., § 19-607; am. 2002, ch. 132, § 1, p. 364.]

ANALYSIS

Authority of officers.
 Authority of private citizen.
 City ordinance.

Authority of Officers.

This section restricting authority of an officer to make arrests at night under certain circumstances does not apply to offenses committed in the presence of the officer. *Smith v. Lott*, 73 Idaho 205, 249 P.2d 803 (1952).

Authority of Private Citizen.

A private citizen, having statutory author-

ity under § 19-604, may likewise arrest at night without a warrant of arrest for a misdemeanor committed in his presence. *Sima v. Skaggs Payless Drug Center, Inc.*, 82 Idaho 387, 353 P.2d 1085 (1960).

City Ordinance.

Arrest without a warrant for begging in violation of a city ordinance, committed in the presence of the arresting officer was a lawful arrest. *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946).

19-608. Information to person arrested. — The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense, or is pursued immediately after its commission, or after an escape. [Cr. Prac. 1864, § 134; R.S., R.C., & C.L., § 7545; C.S., § 8731; I.C.A., § 19-608.]

Cited in: *State v. Thomas*, 116 Idaho 848, 780 P.2d 599 (Ct. App. 1989); *State v. Cooper*, 119 Idaho 654, 809 P.2d 515 (Ct. App. 1991); *State v. Bowman*, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993).

ANALYSIS

Communication of intent to arrest.
 False arrest.
 In general.
 Legislative intent.
 Unlawful arrest.
 Unnecessary force.

Communication of Intent to Arrest.

Although the statute requires officer to inform person to be arrested of his office and purpose, "this becomes an idle formality when officer is known." *People v. Nash*, 1 Idaho 206 (1866).

Officers calling upon suspect to stop without previous notification of intent to arrest him were not justified in shooting him because he ran and are liable for his death. *Helgeson v. Powell*, 54 Idaho 667, 34 P.2d 957 (1934).

If an arrest is made on warrant charging party with commission of offense outside presence of arresting officer and not immediately after commission of offense the officer must inform the arrested party of his intention to make arrest, cause of arrest, and his authority to make arrest, if so requested by arrested party. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Where there was no showing that driver attempted to avoid police officers or failed to stop when they signaled him to do so and

driver complied with officers' request that he produce his vehicle registration and driver's license, at that point, for all practical purposes, the officers, not the driver, were in control of the vehicle and there was no reason for the police officers not to advise the driver of the fact of his arrest, the reason therefor, and their authority to make the arrest. *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

Where deputy sheriff was faced with a dangerous drunk who was attempting to strike him with a potentially lethal weapon, the deputy was not required to give the statutory notice that he was placing defendant under arrest until defendant physically had been subdued. *State v. Dolsby*, 124 Idaho 271, 858 P.2d 810 (Ct. App. 1993).

False Arrest.

Jury was justified in finding police officer guilty of false arrest even though he had a warrant for arrest of plaintiff on charge of assault and battery where evidence showed that officer did not show the warrant, or advise her of his reason for making arrest even though she requested same, and upon her refusal to submit voluntarily proceeded to use force in making arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

In action for damages for false arrest it was not error for trial court to strike from evidence the criminal complaint issued out of police court, if action was not based on absence of authority to make arrest, but the manner in which the arrest was made. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

In General.

This section requires that the person be informed of the cause of the arrest and not the charge for which he might eventually be made to answer; thus, although defendant's underlying arrest was validated under a different charge (aggravated battery) than that for which he was originally cited (misdemeanor domestic battery), defendant was informed of the cause of his arrest, the alleged battery committed on his wife, and such arrest was lawful. *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

Given the defendant's conduct, the police officer's decision to defuse the situation by removing the parties from the scene and having the citizen's arrest completed at the police station was prudent; at the police station the private citizen completed the necessary documentation for the citizen's arrest and followed the requirements of this section. The district court erroneously held that the police unlawfully arrested the defendant where the undisputed facts showed that the private citizen made a valid citizen's arrest at the police station. *State v. Sutherland*, 130 Idaho 472, 943 P.2d 62 (Ct. App. 1997).

Legislative Intent.

The clear intent of this section is to uphold an otherwise lawful arrest when, under the

circumstances, it would not be practical for an officer to inform the arrestee of the fact of the arrest, the officer's authority to make the arrest, and the cause for the arrest. *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

Unlawful Arrest.

Where plaintiff was not informed of defendant's intention to arrest her, of the cause of the arrest, nor of defendant's authority to make it, and was not taken without delay to the nearest and most accessible magistrate in the county where the arrest was made and while the offense was allegedly committed in defendant's presence he did not make the arrest until several hours thereafter nor did he obtain a warrant during the interval and where the court before which plaintiff was eventually taken had no jurisdiction, plaintiff's civil rights under state law were violated. *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

Unnecessary Force.

An officer in making an arrest though legal is guilty of assault and battery, if he uses unnecessary and excessive force. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

19-609. Warrant must be shown. — If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required. [Cr. Prac. 1864, § 127; R.S., R.C., & C.L., § 7546; C.S., § 8732; I.C.A., § 19-609.]

ANALYSIS

Communication of intent to arrest.

Evidence.

In general.

Manner of arrest.

Unnecessary force.

Waiver.

Communication of Intent to Arrest.

If an arrest is made on warrant charging party with commission of offense outside presence of arresting officer and not immediately after commission of offense the officer must inform the arrested party of his intention to make arrest, cause of arrest, and his authority to make arrest, if so requested by arrested party. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Evidence.

Jury was justified in finding police officer guilty of false arrest even though he had a warrant for arrest of plaintiff on charge of assault and battery where evidence showed that officer did not show the warrant, or advise her of his reason for making arrest

even though she requested same, and upon her refusal to submit voluntarily, proceeded to use force in making arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

In General.

Where officer had informed defendant's wife of warrant and when approaching defendant had exhibited papers containing warrant, there was sufficient authority to act; especially when wife had communicated knowledge of warrant to defendant. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

Manner of Arrest.

In action for damages for false arrest it was not error for trial court to strike from evidence the criminal complaint issued out of police court, if action was not based on absence of authority to make arrest, but the manner in which the arrest was made. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Unnecessary Force.

An officer in making an arrest though legal is guilty of assault and battery, if he uses

unnecessary and excessive force. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Waiver.

One, who pleads guilty to criminal charge

following unlawful arrest, does not waive right to sue arresting officer for damages for unlawful arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

19-610. What force may be used. — When the arrest is being made by an officer under the authority of a warrant or when the arrest is being made without a warrant but is supported by probable cause to believe that the person has committed an offense, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all reasonable and necessary means to effect the arrest and will be justified in using deadly force under conditions set out in section 18-4011, Idaho Code. [Cr. Prac. 1864, § 128; R.S., R.C., & C.L., § 7547; C.S., § 8733; I.C.A., § 19-610; am. 1986, ch. 303, § 1, p. 754; am. 1987, ch. 117, § 1, p. 231.]

Compiler's notes. Section 2 of S.L. 1986, ch. 303 is compiled as § 18-4011.

Cited in: *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923).

ANALYSIS

Amount of force.

Civil action.

Duty to public.

Manner of arrest.

Right of self-defense.

Amount of Force.

Where arrest is made by officer under authority of warrant, after information of intention to arrest is given, if person to be arrested either flees or forcibly resists, officer may use all necessary means to effect arrest. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

Officer making arrest has right to use such force as is necessary to subject person sought to be arrested to his authority, but he may not kill misdemeanor in arresting him. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

An officer in making an arrest though legal is guilty of assault and battery, if he uses unnecessary and excessive force. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Jury was justified in finding police officer guilty of false arrest even though he had a warrant for arrest of plaintiff on charge of assault and battery where evidence showed that officer did not show the warrant, or advise her of his reason for making arrest even though she requested same, and upon her refusal to submit voluntarily proceeded to use force in making arrest. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Civil Action.

Where, in construing the record in the light most favorable to the driver who brought claims against arresting police officers for assault and battery, the circumstances

showed that the police officers failed to act in accordance with clearly established Idaho law and failed to act in accordance with clearly established constitutional principles regarding the use of reasonable force in making a lawful arrest, the order of summary judgment in favor of the police officers was improper. *Sprague v. City of Burley*, 109 Idaho 656, 710 P.2d 566 (1985).

Duty to public.

The officers had a duty to the general public in addition to the duty owed to the suspect. The officers' duty to the general public when arresting a potentially dangerous individual is to protect innocent bystanders from any harm the arrestee may inflict upon them during the process of being arrested. *Kessler v. Barowsky*, 129 Idaho 640, 931 P.2d 634 (Ct. App. 1996).

Manner of Arrest.

In action for damages for false arrest it was not error for trial court to strike from evidence the criminal complaint issued out of police court, if action was not based on absence of authority to make arrest, but the manner in which the arrest was made. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).

Right of Self-Defense.

If person sought to be arrested believes or has reason to believe that he is in danger of being killed or of receiving great bodily injury, he may defend himself, repelling force with force, to extent of slaying officer when necessary to save his own life or save himself from great bodily harm. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

If officer uses unnecessary force in making arrest, relation between parties becomes same as those between private individuals. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

In case of mutual combat, reputation of officer for being turbulent, quarrelsome, and dangerous, if communicated prior to affray, is admissible as bearing on question of who was

probable aggressor and whether or not person arrested had reasonable cause to believe his life was in danger. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

19-611. Breaking doors and windows. — To make an arrest, if the offense is a felony, a private person, if any public offense, a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which there is reasonable ground for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired. [Cr. Prac. 1864, §§ 129, 132, 139; R.S., R.C., & C.L., § 7548; C.S., § 8734; I.C.A., § 19-611.]

Cited in: *State v. Pontier*, 95 Idaho 707, 518 P.2d 969 (1974); *State v. Johnson*, 110 Idaho 516, 716 P.2d 1288 (1986).

ANALYSIS

Consent.

Exigent circumstances.

Failure to announce purpose.

Illegally seized evidence.

Purpose.

Restrictions on execution of warrant.

Substantial compliance.

Consent.

On its face this section establishes prerequisites for forcible entries; the statute is not implicated where police officers gain entry by the consent of an occupant of the dwelling. *State v. Gregory*, 130 Idaho 98, 936 P.2d 1340 (Ct. App. 1997).

Where the police officer knew trailer owner personally, conversed with her through the already open door, then was given permission to enter, the officers did not "break open the door or window of the house" or otherwise make a forcible entry of the residence. *State v. Gregory*, 130 Idaho 98, 936 P.2d 1340 (Ct. App. 1997).

Exigent Circumstances.

No inconsistency would exist between a finding of the existence of probable cause to enter and secure a house until a search warrant could be obtained and the finding that no exigent circumstances existed which would allow the officers to ignore the knock and announce statute, because of the entirely different time frames involved. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

To create exigent circumstances which would justify a belief that evidence would be lost requires evidence such as furtive or rapid movements in the house or warning calls within the house; and independent grounds could exist where there is evidence of weapons in the house which would endanger the lives of the officers if they announced their presence. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

The term "exigent circumstances" in the "knock and announce" context does not necessarily, although it may, carry the same meaning as it does in the warrantless entry and warrantless arrest context. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

In the context of "knock and announce" statutes, "exigent circumstances" may refer to those immediate circumstances where a defendant may be armed, where evidence may be easily and immediately destroyed, where a defendant may escape or where a defendant has engaged in furtive conduct. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

Failure to Announce Purpose.

There was substantial evidence to justify the trial judge's finding that exigent circumstances did not exist to excuse noncompliance with the "knock and announce" statutes, where there was no evidence presented which indicated that there were weapons in the house or that there was furtive conduct in the house which would justify the belief that evidence would be lost in the time it would have taken to comply with the "knock and announce" statute. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

Illegally Seized Evidence.

The very sanctity of the home that underlies the passage of "knock and announce" statutes requires that evidence seized as a result of the violation of those statutes be excluded. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

Purpose.

The primary purposes of knock-and-announce statutes are to protect the privacy of the occupant and to prevent situations which are conducive to violent confrontations between the occupant and individuals who enter without proper notice. *State v. Walker*, 107 Idaho 308, 688 P.2d 1213 (Ct. App. 1984).

Restrictions on Execution of Warrant.

While this statute gives the police broad power in executing a warrant, a judge has the

inherent power to limit the conditions under which others may execute the warrant. *State v. Hall*, 132 Idaho 751, 979 P.2d 624 (1999).

Where the magistrate who signed warrants of attachment specifically limited where and when the warrants could be served, and where the restriction as to "any public place" was ignored by police when they executed the warrants upon the defendant in his motel room, the forcible entry into the defendant's "home" was invalid and thus equivalent to a prohibited warrantless entry. *State v. Hall*,

132 Idaho 751, 979 P.2d 624 (1999).

Substantial Compliance.

Where officers otherwise complied with knock-and-announce statute by knocking, announcing their presence and disclosing their identity or authority, but stated their purpose for entering only after they had gained entrance to the premises, substantial compliance with the statute occurred and the entry was legal. *State v. Walker*, 107 Idaho 308, 688 P.2d 1213 (Ct. App. 1984).

19-612. Force for purpose of liberation. — Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein. [Cr. Prac. 1864, §§ 129, 132, 139; R.S., R.C., & C.L., § 7549; C.S., § 8735; I.C.A., § 19-612.]

19-613. Weapons may be taken. — Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken. [R.S., R.C., & C.L., § 7550; C.S., § 8736; I.C.A., § 19-613.]

Cited in: *State v. Anderson*, 31 Idaho 514, 174 P. 124 (1917); *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996).

Application.

The language of this section is permissive, not restrictive; its application is not limited to citizen's arrests; by referring to "any persons making an arrest" it encompasses within its scope law enforcement officers, however, it does not purport to diminish any authority

that law enforcement officers might otherwise possess to conduct searches of persons in their custody; law enforcement officers who have arrested a suspect are entitled to conduct a full search incident to arrest for the purpose of not only finding and removing weapons but also preserving evidence and removing valuables that may be accessible by the arrestee. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

19-614. Duty of private person making arrest. — A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him to a peace officer. [Cr. Prac. 1864, § 140; R.S., R.C., & C.L., § 7551; C.S., § 8737; I.C.A., § 19-614.]

ANALYSIS

Delivery to police officer.
Liability for false imprisonment.
Searches.
— Probable cause.

Delivery to Police Officer.

A police officer may take custody of a person delivered pursuant to this section following a citizen's arrest for a misdemeanor even though the officer may not have grounds for

an independent police arrest because the misdemeanor did not occur in the officer's presence. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

Liability for False Imprisonment.

Fact that plaintiff, in action for false arrest against private citizen, was not taken immediately before a magistrate after such arrest did not render the defendants liable for damages since their responsibility ended when they turned plaintiff over to police. *Sima v.*

Skaggs Payless Drug Center, Inc., 82 Idaho 387, 353 P.2d 1085 (1960).

Searches.

A police officer may conduct a search incident to a citizen's arrest. A search conducted by a police officer incident to a citizen's arrest is justified by the same rationale underlying searches incident to any other lawful arrest. The need to preserve evidence and to remove weapons and items of value that the arrestee might use to effect an escape, is equally present whether a citizen or police officer initiated the arrest. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

—Probable Cause.

Although police officers must routinely make probable cause assessments, subject to later review by a court, when they are contemplating making an arrest themselves, the courts will not cast upon police officers the judicial role of determining whether there was probable cause for a citizen's arrest before conducting a search incident to the arrest. Persons arrested by private citizens as well as those arrested by police officers are protected by the requirement that a probable cause determination be made promptly by a neutral, detached magistrate. *State v. Moore*, 129 Idaho 776, 932 P.2d 899 (Ct. App. 1996).

19-615. Procedure upon arrest without warrant. — When an arrest is made without a warrant by a peace officer or private person the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate. [Cr. Prac. 1864, § 140; R.S., R.C., & C.L., § 7552; C.S., § 8738; I.C.A., § 19-615.]

ANALYSIS

Delay in arraignment.
Delay in obtaining confession.
Effect of unnecessary delay.
In general.
Prejudice.
Timely presentation.
Waiver of delay.

Delay in Arraignment.

Where plaintiff was not informed of defendant's intention to arrest her, of the cause of the arrest, nor defendant's authority to make it, and was not taken without delay to the nearest and most accessible magistrate in the county where the arrest was made and while the offense was allegedly committed in defendant's presence he did not make the arrest until several hours thereafter nor did he obtain a warrant during the interval and where the court before which plaintiff was eventually taken had no jurisdiction, plaintiff's civil rights under state law were violated. *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

Where first statement by defendant was made prior to his arrest and second statement was made under conditions that indicated that there were no "third degree" tactics utilized by police, any possible delay in arraignment under this section did not act to make statements inadmissible at trial. *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980).

In the 27 hours between defendant's arrest and his initial appearance before a magistrate, all of the inculpatory evidence secured by the police was obtained within the 24 hours allowed by I.C.R. 5 and was collected

within the confines of the Rule, and, as defendant did not demonstrate prejudice the district court's admission of such inculpatory evidence was appropriate. *State v. Knapp*, 120 Idaho 343, 815 P.2d 1083 (Ct. App. 1991).

An uncooperative motorist was improperly held in county jail for four days following her arrest before being brought before a magistrate despite her repeated demands to see a magistrate where county officials made no showing that the delay was justified by reasonable and prompt administrative procedures, or that the delay was anything other than a coercive measure imposed to gain her cooperation in answering booking questions. *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir.), cert. denied, 510 U.S. 991, 114 S. Ct. 549, 126 L. Ed. 2d 450 (1993).

Delay in Obtaining Confession.

Confession was not invalid for delay of officer in taking defendant before magistrate where no "third degree" methods were used and defendant testified to substantially same facts as contained in confession. *State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944).

The voluntary character of a confession obtained prior to arraignment is placed in doubt when there is an unreasonable delay between arrest and arraignment, however, the confession is not per se inadmissible. *State v. Wyman*, 97 Idaho 486, 547 P.2d 531 (1976), overruled on other grounds, *State v. McCurdy*, 100 Idaho 683, 603 P.2d 1017 (1979).

Effect of Unnecessary Delay.

Failure to bring defendant to a magistrate without unnecessary delay did not deprive

district court of right to try defendant for alleged offense. *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955).

While the court does not necessarily condone the lapse of time which occurred between arrest and the petitioner's appearance before a magistrate, the facts alleged are not such as to affect the jurisdiction of the court which issued the process, petitioner having been apprehended at 4:00 A.M. on Saturday and not being taken before a justice of the peace until about 3:30 P.M. the following Monday. *Smith v. State*, 87 Idaho 163, 391 P.2d 849 (1964).

In General.

Defendant could not complain of delay in being taken before a magistrate where arresting officer arrived in town, with defendant in custody, after 5:30 in the evening and took defendant before magistrate following morning, especially where defendant waived preliminary examination. *State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944).

Prejudice.

The defendant has the burden of showing prejudice caused by delay; to demonstrate prejudice defendant must show that the un-

necessary delay reasonably contributed to the acquisition of inculpatory evidence or resulted in the loss of exculpatory evidence or that the delay otherwise affected his ability to present a defense. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Timely Presentation.

The laws of Idaho guaranteeing timely presentation to a magistrate place substantive limitations on official discretion and contain explicitly mandatory language sufficient to create a liberty interest protected by the Fourteenth Amendment and actionable under 42 U.S.C. § 1983. *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir.), cert. denied, 510 U.S. 991, 114 S. Ct. 549, 126 L. Ed. 2d 450 (1993).

Waiver of Delay.

Failure of state to bring defendant before a magistrate without unnecessary delay was waived by the defendant where motion to dismiss for alleged irregularity was not filed until after defendant had entered his plea. *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955).

19-616. Telegraphing warrant for service. — A justice of the Supreme Court or probate judge may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it as though he held an original warrant issued by the magistrate making the indorsement. [R.S., R.C., & C.L., § 7553; C.S., § 8739; I.C.A., § 19-616.]

19-617. Telegraphic copy of warrant. — Every officer causing telegraphic copies of warrants to be sent must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder. [R.S., R.C., & C.L., § 7554; C.S., § 8740; I.C.A., § 19-617.]

19-618. Recapture after escape. — If a person arrested escape or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue and retake him at any time and in any place within the state. [Cr. Prac. 1864, § 141; R.S., R.C., & C.L., § 7559; C.S., § 8741; I.C.A., § 19-618.]

19-619. Breaking doors and windows for recapture. — To retake the person escaping or rescued, the person pursuing may break open an outer or inner door or window of a dwelling-house, if, after notice of his

intention, he is refused admittance. [Cr. Prac. 1864, § 142; R.S., R.C., & C.L., § 7560; C.S., § 8742; I.C.A., § 19-619.]

19-620. Definition. — For the purpose of this act, a “temporary road block” means any structure, device or means used by duly authorized law enforcement officers of the state of Idaho and of its political subdivisions for the purpose of controlling all traffic through a point on a highway whereby all vehicles may be slowed or stopped. [1957, ch. 31, § 1, p. 49.]

Compiler’s notes. The words “this act” refer to S.L. 1957, ch. 31 compiled as §§ 19-620 — 19-623.

19-621. Authority to establish road blocks. — The duly elected or appointed sheriffs, state policemen or policemen of cities of the first or second class of the state of Idaho are hereby authorized to establish, in their respective or adjacent jurisdictions, temporary road blocks upon the highways of this state or city streets for the purpose of apprehending persons reasonably believed by such officers to be wanted for violation of the laws of this state, of any other state, or of the United States, and using such highways or streets. [1957, ch. 31, § 2, p. 49.]

ANALYSIS

Prerequisites to road blocks.
Road blocks to detect drunk drivers.
Standard for reasonableness.

Prerequisites to Road Blocks.

If the police have a reasonable belief that a crime has been committed and they have a basic description of the suspect, this section allows them to set up a road block on a likely escape route to apprehend the suspect. *State v. Gascon*, 119 Idaho 932, 812 P.2d 239 (1991).

Road Blocks to Detect Drunk Drivers.

A police road block designed to detect and deter drunk driving is not constitutionally permissible where the police have failed to obtain a judicial warrant, have no probable cause to believe the automobile driver is engaged in criminal wrongdoing, and lack legislative authority to establish a road block. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

Because the evidence used to convict the

defendant of driving under the influence was unconstitutionally obtained pursuant to a warrantless search, prior to which the police lacked individualized suspicion of criminal wrongdoing and authority to establish a road block, the magistrate erred in denying the defendant’s motion to suppress. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

Standard for Reasonableness.

An objective standard for measuring the reasonableness of an intrusion on the Fourth Amendment interests of motorists detained by a temporary road block is whether the officers have probable cause to believe a serious felony is being or has recently been committed, and the officers reasonably believe the perpetrator is using the highways or streets. *State v. Gascon*, 119 Idaho 923, 811 P.2d 1103 (Ct. App. 1989).

Collateral References. Validity of police road blocks or checkpoints for purpose of discovery of illegal narcotics violations. 82 A.L.R.5th 103.

19-622. Minimum requirements. — For the purpose of warning and protecting the traveling public, the minimum requirements to be met by such officers establishing temporary road blocks, if time and circumstances allow, are:

1. The temporary road block must be established at a point on the highway or street clearly visible at a distance of not less than 100 yards in either direction.

2. At the point of the temporary road block, a sign shall be placed on the center line of the highway or street displaying the word "stop" in letters of sufficient size and luminosity to be readable at a distance of not less than 50 yards, in both directions, either in daytime or darkness.

3. At the same point of the temporary road block, at least one (1) blue light, on and burning, must be placed at the side of the highway or street which shall be a flashing or intermittent beam of light, clearly visible to the oncoming traffic, at a distance of not less than 100 yards.

4. At a distance of not less than 200 yards from the point of the temporary road block, warning signs must be placed at the side of the highway or street, containing any wording of sufficient size and luminosity, to warn the oncoming traffic that a "police stop" lies ahead. A burning beam light, flare or reflector must be placed near such signs for the purpose of attracting the attention of the traffic to the sign. [1957, ch. 31, § 3, p. 49; am. 1972, ch. 285, § 1, p. 717.]

Compiler's notes. Section 7 of S.L. 1972, ch. 285 provided the act should take effect on and after July 1, 1972.

Application.

It is doubtful that the legislature intended to establish, in this section, standards of reasonableness for purposes of the Fourth Amendment or of Const., Art. 1, § 17. Accordingly, while the requirements of this section might be of greater importance in a case involving an accident at a road block or involving failure to comply with an officer's

directions to stop at a road block, the statute was not controlling in this case, where absent such events, a robbery suspect was apprehended at a road block. At most, the failure to comply with the statute is but one of the factors to consider in determining the reasonableness of the officer's conduct under a totality of the circumstances. *State v. Gascon*, 119 Idaho 932, 812 P.2d 239 (1991).

Collateral References. Validity of police road blocks or checkpoints for purpose of discovery of illegal narcotics violations. 82 A.L.R.5th 103.

19-623. Penalty. — Any person who shall proceed or travel through a road block without subjecting himself to the traffic control so established shall be guilty of a misdemeanor, and shall be punished by a fine of not more than \$300.00, or by imprisonment in the county jail for not more than 6 months, or by both fine and imprisonment. [1957, ch. 31, § 4, p. 49.]

Compiler's notes. Section 5 of S.L. 1957, ch. 31 declared an emergency. Approved February 12, 1957.

19-624. Arrest with certified copy of warrant. — Any arrest that may be lawfully made with an original warrant, may be made with a copy thereof, certified by the issuing magistrate to be a true and correct copy of the original warrant that is in his possession. [1967, ch. 114, § 1, p. 222.]

Compiler's notes. Section 2 of S.L. 1967, ch. 114 declared an emergency. Approved March 11, 1967.

19-625. Detention for obtaining evidence of identifying physical characteristics. — (1) A peace officer who is engaged, within the scope of his authority, in the investigation of an alleged criminal offense which is a felony may make written application upon oath or affirmation to a judge of

any district court, or magistrates division thereof, for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual residing in or found in the jurisdiction over which the judicial officer presides. The order shall require the presence of the identified or particularly described individual at such time and place as the court shall direct for obtaining the identifying physical characteristic evidence. Such order may be issued by the judicial officer upon a showing under oath of all the following:

(A) Probable cause for belief that a specifically described criminal offense which is a felony has been committed.

(B) Reasonable grounds exist, which may or may not amount to probable cause, to believe that the identified or particularly described individual committed the criminal offense.

(C) Procurement of evidence of identifying physical characteristics from the identified or particularly described individual may contribute to the identification of the individual who committed such offense.

(D) Such evidence cannot otherwise be obtained by the investigating officer.

(2) Any order issued pursuant to the provisions of this section shall specify the following:

(A) The alleged criminal offense which is the subject of the application.

(B) The specific type of identifying physical characteristic evidence which is sought.

(C) The relevance of such evidence to the particular investigation.

(D) The identity or description of the individual who may be detained for obtaining such evidence.

(E) The name and official status of the investigative officer authorized to effectuate such detention and obtain such evidence.

(F) The place at which the obtaining of such evidence shall be effectuated.

(G) The time that such evidence shall be taken except that no person may be detained for a period of more than three (3) hours for the purpose of taking such evidence.

(H) That the individual so identified or described shall have the right to legal counsel during the detention when such evidence is obtained and if he is unable to afford private counsel an attorney shall be provided at public expense as provided by section 19-852, Idaho Code.

(I) That the individual will be under no legal obligation to submit to any interrogation or to make any statement during the period of his appearance unless sound of voice identification is required.

(J) The period of time, not exceeding ten (10) days, during which the order shall continue in force and effect. If the order is not executed within ten (10) days, a new order may be issued, pursuant to the provisions of this section.

(3) The order issued pursuant to this section shall be returned to the court not later than fifteen (15) days after its date of issuance and shall be accompanied by a sworn statement indicating how and when the evidence was taken and the type of evidence taken. The court shall give to the person

from whom such evidence was taken a copy of the order and a copy of the sworn statement indicating what type of evidence was taken, if any.

(4) For the purposes of this section, "identifying physical characteristics" shall mean the fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, or photographs of an individual. [I.C., § 19-625, as added by 1972, ch. 116, § 1, p. 230; am. 2001, ch. 142, § 3, p. 507.]

Compiler's notes. Section 2 of S.L. 2001, ch. 142 is compiled as § 19-402.

Section 4 of S.L. 2001, ch. 142 declared an emergency and provided: "This act shall be in full force and effect on and after its passage and approval, and shall apply retroactively to any violation alleged to have been committed as to which the time for commencing prosecution has not expired."

Cited in: State v. Hoisington, 104 Idaho 153, 657 P.2d 17 (1983).

ANALYSIS

Applicability.

Construction.

Ineffective assistance of counsel.

Invalid detention warrant.

Right to attorney.

Applicability.

This section deals only with the detention of an individual for purposes of obtaining identifying physical evidence and had no bearing on whether or not probable cause existed to issue a search warrant for the taking of blood and urine samples. *Hopper v. Hayes*, 573 F. Supp. 1368 (D. Idaho 1983).

A warrant of detention may be issued by a judge where the requirements of this section are met and the physical evidence sought will materially aid in the investigation of an Idaho felony or appears reasonably calculated to lead to the discovery of information that will do so. *State v. Spor*, 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000).

Construction.

This section authorizes a limited intrusion into a person's privacy on grounds which may not amount to probable cause for arrest; when the authority granted by a detention warrant is exceeded, the permissibility of the intrusion is determined by the same standard as a warrantless arrest. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

No language in this section limits the issuance of a warrant of detention to obtaining evidence of physical characteristics directly related to the investigation of criminal activity in Idaho, and although the DNA obtained from defendant's blood was not directly re-

lated to his criminal conduct in Idaho, it was directly relevant to confirming the paternity of a child conceived in Washington during intercourse with a minor child who alleged that she had a sexual relationship with the defendant a year earlier in Idaho. Therefore, the evidence was relevant to establishing the victim's credibility under the rules of evidence, as well as a common plan to sexually exploit an Idaho victim. *State v. Spor*, 134 Idaho 315, 1 P.3d 816 (Ct. App. 2000).

Ineffective Assistance of Counsel.

Where defendant after being told about lineup requested to speak with an attorney whereupon the public defender was called and after detention order was read to the public defender he spoke to defendant telling him to cooperate in the lineup but not to answer any questions, it was more appropriate to apply a rule requiring the defendant to show that prejudice resulted from the alleged ineffectiveness of his counsel in not attending the lineup, rather than to apply a per se rule that prejudice must be presumed to exist when counsel fails to attend a preindictment lineup. *Boman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996).

Invalid Detention Warrant.

Even if the detention warrant is invalid, it, like an arrest warrant that turns out to be defective, cannot invalidate an arrest where the police possess probable cause to make the arrest. Therefore, where the officers had reasonable cause to arrest the defendant at the time he was detained, and they also had authority, under subdivision 3. of § 19-603, to make a warrantless arrest, the arrest was valid, and the roll of money found in the defendant's pocket was lawfully acquired in a search incident to that arrest. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Right to Attorney.

It was improper for the police officer to indicate in a conversation with the defendant that since the defendant was being held under the detention warrant, and not under arrest, he was not entitled to an attorney. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

CHAPTER 7

FRESH PURSUIT LAW

SECTION.

- 19-701. Officer of another state entering state in fresh pursuit of suspected felon.
- 19-701A. Officer of this state in fresh pursuit of suspected felon.
- 19-702. Person arrested to be taken before magistrate — Extradition or discharge.

SECTION.

- 19-703. Construction of section.
- 19-704. District of Columbia included.
- 19-705. "Fresh pursuit" defined.
- 19-706. Certification of act to other states.
- 19-707. Short title.

19-701. Officer of another state entering state in fresh pursuit of suspected felon. — Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state. [1941, ch. 69, § 1, p. 133.]

Cross ref. Initial appearance before magistrate, I.C.R. 5.

Sec. to sec. ref. This chapter is referred to in §§ 50-209, 67-2337.

This section is referred to in §§ 19-702, 19-703.

Authorized Pursuit.

Where Nevada patrolman observed defendant's vehicle weaving on the highway and followed him into Idaho, where Nevada patrolman stopped and detained defendant un-

til Idaho patrolman arrived who took defendant into custody, gave him a sobriety test which he failed, and arrested him, pursuit and detention of defendant by Nevada patrolman was legal. *State v. Ruhter*, 107 Idaho 282, 688 P.2d 1187 (1984).

Collateral References. 5 Am. Jur. 2d, Arrest, § 72.

6A C.J.S., Arrest, § 18.

Fugitive Felon Act as invasion of reserved powers of states. 154 A.L.R. 1168.

19-701A. Officer of this state in fresh pursuit of suspected felon. — Any peace officer of this state in fresh pursuit of a person who is reasonably believed by him to have committed a felony in this state or has committed, or attempted to commit, any criminal offense or traffic infraction in this state in the presence of such officer, or for whom a warrant of arrest is outstanding for a criminal offense, shall have authority to pursue, arrest and hold in custody or cite such person anywhere in this state. All privileges and immunities from liability, exemption from law, ordinances and rules, all pension relief, disability, workmen's compensation, and other benefits which normally apply to peace officers while they perform their duties in their own jurisdiction shall also apply to them when acting as contemplated above. In addition, this protection shall also be applicable when a peace officer is acting in response to a request for assistance out of his employing jurisdiction. The cost of this protection shall be borne by the individual peace officer's employing jurisdiction. [I.C., § 19-701A, as added by 1980, ch. 152, § 1, p. 322; am. 1981, ch. 137, § 1, p. 240; am. 1987, ch. 85, § 2, p. 160.]

Compiler's notes. Section 2 of S.L. 1980, ch. 152 is compiled as § 50-209.

Section 1 of S.L. 1987, ch. 85 is compiled as § 50-209.

Section 3 of S.L. 1980, ch. 152 declared an emergency. Approved March 25, 1980.

Section 3 of S.L. 1987, ch. 85 declared an emergency. Approved March 24, 1987.

Fresh Pursuit.

The statutory doctrine of "fresh" pursuit empowers a peace officer to enter another jurisdiction while attempting to apprehend a violator of the law. It applies only to apprehension of persons believed to have committed felonies. *State v. Wren*, 115 Idaho 618, 768 P.2d 1351 (Ct. App. 1989).

19-702. Person arrested to be taken before magistrate — Extradition or discharge. — If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested. [1941, ch. 69, § 2, p. 133.]

Compiler's notes. "Section 1 of this act" means section 1 of S.L. 1941, ch. 69, which is compiled as § 19-701.

19-703. Construction of section. — Section 1 of this act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful. [1941, ch. 69, § 3, p. 133.]

Compiler's notes. "Section 1 of this act" means section 1 of S.L. 1941, ch. 69, which is compiled as § 19-701.

Cited in: *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974).

19-704. District of Columbia included. — For the purpose of this act the word "state" shall include the District of Columbia. [1941, ch. 69, § 4, p. 133.]

Compiler's notes. "This act," as used in this section, means S.L. 1941, ch. 69, which is codified as §§ 19-701 and 19-702 to 19-707.

19-705. "Fresh pursuit" defined. — The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay. [1941, ch. 69, § 5, p. 133.]

Compiler's notes. "This act," as used in this section, means S.L. 1941, ch. 69, which

is codified as §§ 19-701 and 19-702 to 19-707.

19-706. Certification of act to other states. — Upon the passage and approval by the governor of this act, it shall be the duty of the secretary of state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States. [1941, ch. 69, § 6, p. 133.]

Compiler's notes. "This act," as used in this section, means S.L. 1941, ch. 69, which is codified as §§ 19-701 and 19-702 to 19-707.

Section 7, S.L. 1941, ch. 69, provides as follows: "If any part of this act is for any

reason declared void, it is declared to be the intent of this act that such invalidity shall not affect the validity of the remaining portions of this act."

19-707. Short title. — This act may be cited as the "Uniform Act on Fresh Pursuit." [1941, ch. 69, § 8, p. 133.]

Compiler's notes. "This act," as used in this section, means S.L. 1941, ch. 69, which is codified as §§ 19-701 and 19-702 to 19-707.

CHAPTER 8

EXAMINATION OF CASE AND DISCHARGE OR COMMITMENT OF ACCUSED

SECTION.

- 19-801. Accused to be informed of charge — Right to counsel.
- 19-802. Sending for counsel.
- 19-803, 19-803A. [Repealed.]
- 19-804. Preliminary examination.
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- 19-808. Examination of witnesses for state.
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SECTION.

- 19-823. Commitment for failure to give security.
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 19-863A. Capital crimes defense fund authorized.
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SECTION.

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 19-867. Short title.
 19-868. Statement of legislative intent.
 19-869. Creation — Appointment — Qualifications — Term — Compensation.
 19-870. Powers and duties.
 19-871. Appointment of additional counsel.
 19-872. Annual report.

19-801. Accused to be informed of charge — Right to counsel. — When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings. [Cr. Prac. 1864, § 143; R.S., R.C., & C.L., § 7565; C.S., § 8743; I.C.A., § 19-701.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Constitutional right to counsel, Const., Art. 1, § 13.

Initial appearance before magistrate, I.C.R. 5.

Preliminary hearing, I.C.R. 5.1, 5.2.

Sec. to sec. ref. This chapter is referred to in §§ 18-207, 18-211, 19-2515A, 19-2522, 19-4902, 66-322, 66-329, 66-339B, 66-406.

Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909); State v. Frederic, 28 Idaho 709, 155 P. 977 (1916); Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959).

ANALYSIS

Examination.

—Waiver.

Information.

Jurisdiction and venue.

Knowledge of offense.

Power and duty of prosecutor.

Public offense.

Right to counsel.

Examination.

Preliminary examination before committing magistrate is in no sense a trial. It is not expected or required that same formality and precision must obtain as is required in trial. State v. Bilboa, 33 Idaho 128, 190 P. 248 (1920).

On preliminary examination, magistrate is not governed by technical rules of evidence governing trial. In re Hollingsworth, 49 Idaho 455, 289 P. 607 (1930).

—Waiver.

When prisoner is informed of his rights, his subsequent waiver of preliminary examina-

tion will be upheld. State v. Larkins, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, State v. White, 93 Idaho 153, 456 P.2d 797 (1969); State v. Woodward, 41 Idaho 353, 238 P. 525 (1925).

A defendant may waive right to preliminary examination through co-defendant, without appearing in person. State v. Woodward, 41 Idaho 353, 238 P. 525 (1925).

Information.

A proceeding initiated by information entitles the accused the right to a preliminary hearing before an impartial magistrate to determine whether a crime has been committed and whether there is probable cause to believe that the accused committed it. State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).

Jurisdiction and Venue.

It is the province of the prosecuting attorney to determine the precinct and magistrate, within the county wherein the offense is alleged to have been committed, where such preliminary examination will be held. State v. Griffin, 4 Idaho 462, 40 P. 58 (1895).

Preliminary hearing must be held in county where crime is alleged to have been committed. State v. Griffin, 4 Idaho 462, 40 P. 58 (1895).

It was the intent of the framers of the constitution to provide for probate judges or justices of the peace to act as examining magistrates, before whom persons charged with a felony or indictable misdemeanor might have or waive preliminary examinations. Fox v. Flynn, 27 Idaho 580, 150 P. 44 (1915).

Jurisdiction of justice of the peace, sitting as an examining magistrate, extends throughout the county, and after complaint has been entertained and warrant issued, his jurisdiction cannot be ousted by the officer

who makes the arrest; however, accused may waive such right by failure to object. *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Statute requiring all proceedings to be in district court, though offense a misdemeanor, without preliminary examination, violates Const., Art. 1, § 8. *State v. Wilmot*, 51 Idaho 233, 4 P.2d 363 (1931).

Knowledge of Offense.

The complaint is sufficient if it gives defendant fair opportunity to know general character and outline of the offense for which he is being examined. *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

Power and Duty of Prosecutor.

The prosecuting attorney is not required to be present except for specific statutory enactment or request of magistrate, however, he has a right to appear and take complete charge, including right to dismiss charge, and district court has no authority to appoint a special prosecutor unless the regular prosecutor fails or refuses to act. *Mills v. Board of County Comm'rs*, 35 Idaho 47, 204 P. 876 (1922).

Public Offense.

The fact that the Idaho peace officer making the complaints alleged that a person has committed a public offense in another jurisdiction, and is a fugitive therefrom, does not make it any less a complaint of "a public offense." *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Right to Counsel.

In murder prosecution, that magistrate informed accused that he was entitled to a preliminary examination and an attorney, whereupon accused asked for services of attorney, but magistrate advised accused that he could not have counsel until case reached district court, did not deny defendant's consti-

tutional right to counsel. *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

In petition for writ of habeas corpus asserting a violation of constitutional rights, appellant was shown to have waived preliminary hearing upon complaint being read to him and his rights being made known, that on arraignment in the district court he specifically stated he did not desire counsel and he being a man of more than average intelligence it was shown from the time of his arrest to the time of pronouncing sentence that he knew and was fully informed of his rights. *Cobas v. Clapp*, 79 Idaho 419, 319 P.2d 475 (1957), cert. denied, 356 U.S. 941, 78 S. Ct. 785, 2 L. Ed. 2d 816 (1958).

Appellant cannot complain of the fact that counsel was not appointed for him at the expense of the state for his representation in the preliminary hearing. *Johnson v. State*, 85 Idaho 123, 376 P.2d 704 (1962).

Although the state is required to furnish an indigent defendant, who is charged with a serious crime, representation by counsel at any critical stage of a criminal proceeding, a preliminary hearing is not such "critical stage"; therefore, where no plea was entered or sought at such hearing, and nothing accused said or did therein was referred to at his trial, accused was not denied due process by failure to have an attorney at the preliminary hearing, no prejudice having befallen him. *Freeman v. State*, 87 Idaho 170, 392 P.2d 542 (1964); *McGuire v. State*, 87 Idaho 185, 392 P.2d 551 (1964).

Collateral References. 21A Am. Jur. 2d, Criminal Law, § 977.

22A, 23 C.J.S., Criminal Law, §§ 469 — 654, 1115 — 1141.

Right of person accused of crime to exclude public from preliminary hearing or examination. 31 A.L.R.3d 816.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing. 84 A.L.R.3d 811.

19-802. Sending for counsel. — He must also allow the defendant a reasonable time to send for counsel, and postpone the examination for that purpose, and must upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name. The officer must, without delay and without fee, perform that duty. [Cr. Prac. 1864, § 144; R.S., R.C., & C.L., § 7566; C.S., § 8744; I.C.A., § 19-702.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941); *Cobas v. Clapp*, 79 Idaho 419, 319 P.2d 475 (1957); *Foster v. Walus*, 81 Idaho 452, 347 P.2d 120 (1959); *Freeman v. State*, 87 Idaho 170, 392 P.2d 542 (1964); *McGuire v. State*, 87 Idaho 185, 392 P.2d 551 (1964).

Fugitive from Another Jurisdiction.

The fact that the Idaho peace officer making the complaints alleged that a person has committed a public offense in another jurisdiction, and is a fugitive therefrom, does not

make it any less a complaint of "a public offense." *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

19-803. Examination — When to proceed. [Repealed.]

Compiler's notes. This section which comprised Cr. Prac. 1864, § 145; R.S., R.C. &

C.L., § 7567; C.S., § 8745; I.C.A., § 19-703, was repealed by S.L. 1967, ch. 181, § 18.

19-803A. Counsel represented at preliminary hearing — Postponement by magistrate — Appointment — Compensation. [Repealed.]

Compiler's notes. This section which comprised I.C., § 19-803A, as added by 1965, ch.

99, § 1, p. 185, was repealed by S.L. 1967, ch. 181, § 19.

19-804. Preliminary examination. — The magistrate shall conduct a preliminary examination unless the same is waived by the defendant. At such preliminary examination, the magistrate shall first read the complaint to the defendant unless the defendant waives such reading, and it shall be the duty of the magistrate at such examination to determine whether or not a public offense has been committed and whether or not there is probable or sufficient cause to believe that the defendant committed such public offense. Once commenced, the examination must be completed at one (1) session unless the magistrate for good cause shown by court order postpones it, or unless the parties stipulate in writing or upon the court record to a continuance to a date certain. If the defendant is incarcerated, the postponement or continuance cannot be for more than six (6) days or, if the defendant is not incarcerated, for more than twenty (20) days, unless on motion by or with the consent of the defendant the court orders a longer continuance or postponement. [Cr. Prac. 1864, § 146; R.S., R.C., & C.L., § 7568; C.S., § 8746; I.C.A., § 19-704; am. 1969, ch. 467, § 1, p. 1339; am. 1976, ch. 282, § 1, p. 967.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Pole*, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

ANALYSIS

Appeal.

Evidentiary error.

Illegal postponement.

Probable cause.

Purpose.

Waiver.

Appeal.

Absent a showing of prejudice to defendant, by a continuance, the appellate court will not inquire into the preliminary proceedings. *State v. Linn*, 93 Idaho 430, 462 P.2d 729 (1969).

A magistrate's decision that probable cause exists to bind a defendant over to the district court for trial on the charges against him or her should be overturned only upon a showing that the magistrate abused his discretion. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336, cert. denied, 461 U.S. 934, 103 S. Ct. 2101, 77 L. Ed. 2d 308 (1983).

The decision of a magistrate that there exists probable cause to bind a defendant over to district court for a trial on the charges should be overturned only on a showing that the committing magistrate abused his discretion. *State v. Owens*, 101 Idaho 632, 619 P.2d

787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

A magistrate's commitment will not be deemed an abuse of discretion, and a district judge's denial of a motion challenging probable cause will not be disturbed on appeal, if under any reasonable view of the evidence, including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

The denial of a motion to dismiss following a preliminary hearing will not be disturbed on appeal if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Evidentiary Error.

Even if the magistrate errs in relying on evidence at the preliminary hearing that is ultimately determined to be inadmissible, the error is not a ground for vacating a conviction where the defendant receives a fair trial and is convicted, and there is sufficient evidence to sustain the conviction. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336, cert. denied, 461 U.S. 934, 103 S. Ct. 2101, 77 L. Ed. 2d 308 (1983).

Illegal Postponement.

Fact that postponement is granted in violation of statute does not deprive court of jurisdiction. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

Probable Cause.

Where state presented evidence at preliminary hearing that heifer reported lost by owner was same animal received by third person in exchange for labor performed, that county sheriff had learned during investigation that defendant had sold heifer to third party and had discovered owner's brand on animal, and that third party produced bill of sale from defendant, there was sufficient probable cause under this section and § 19-

815 to bind defendant over to district court for trial. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Purpose.

The purpose of a preliminary examination before a magistrate is to determine whether a crime has been committed and whether there is probable cause to believe that the defendant committed it. *State v. O'Mealey*, 95 Idaho 202, 506 P.2d 99 (1973).

A preliminary hearing is not a discovery tool but a means by which probable cause, which would indicate the commission of a crime, is discovered and a certified record of the hearing must be compiled if the information gathered at the hearing is to be used by a district court. *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976).

When the State charges a person with a felony, unless he is indicted by a grand jury, the defendant is entitled to a preliminary hearing to determine if there is sufficient evidence to warrant holding him to answer in the district court. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

At the preliminary hearing the State is not required to prove the defendant guilty beyond a reasonable doubt. Rather, it need only show that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Waiver.

The right to a preliminary hearing can be waived, and a waiver made voluntarily, knowingly and intelligently is effective even in the absence of advice of counsel. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

The defendant effectively waived compliance with the preliminary hearing requirement, where the district judge asked the defendant if he gave up the right to a preliminary hearing, the defendant indicated he had, and this question was preceded by an explanation of the right to a preliminary hearing. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

19-805. Commitment or bail on postponement. — If a postponement is had the magistrate must commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this code, as security for his appearance at the time to which the examination is postponed. [Cr. Prac. 1864, § 147; R.S., R.C., & C.L., § 7569; C.S., § 8747; I.C.A., § 19-705.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-806. Form of commitment. — The commitment for examination is made by an indorsement, signed by the magistrate on the warrant of arrest, to the following effect:

The within named A.B. having been brought before me under this warrant, is committed for examination to the sheriff of _____.

If the sheriff is not present, the defendant may be committed to the custody of a peace officer. [Cr. Prac. 1864, § 148; R.S., R.C., & C.L., § 7570; C.S., § 8748; I.C.A., § 19-706.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-807. Issuance of subpoenas for witnesses. — The magistrate shall, prior to the preliminary examination, issue subpoenas, subscribed by him, for witnesses required by the prosecution who are in the state, and for witnesses required by the defendant who are in the state. [Cr. Prac. 1864, § 149; R.S., R.C., & C.L., § 7571; C.S., § 8749; I.C.A., § 19-707; am. 1969, ch. 467, § 2, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Amendments.

Prosecuting attorney may be permitted to correct error made in indorsing name of witness on information where there is no showing that it misled or prejudiced defendant. *State v. McGann*, 8 Idaho 40, 66 P. 823 (1901).

19-808. Examination of witnesses for state. — The witnesses for the prosecution must be examined under oath in the presence of the defendant, and may be cross-examined in his behalf. [Cr. Prac. 1864, § 150; R.S., R.C., & C.L., § 7572; C.S., § 8750; I.C.A., § 19-708; am. 1969, ch. 467, § 3, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-809A.

Cited in: *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976); *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

Nature of Examination.

Magistrate is not bound by technical rules of evidence which govern trial of offense. In re *Hollingsworth*, 49 Idaho 455, 289 P. 607 (1930).

19-809. Examination of witnesses for defendant. — When the examination of witnesses on the part of the people is closed, the defendant may produce any material witnesses, which witnesses must be sworn, examined and cross-examined in the presence of the defendant. [R.S., R.C.,

& C.L., § 7573; C.S., § 8751; I.C.A., § 19-709; am. 1969, ch. 467, § 4, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).

Duty of Defendant.

The defendant is under no duty to present

any evidence at the preliminary hearing though he may do so, and the state has the burden of proof of meeting the requirements of the statute. State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971).

The cross-examination of the defendant regarding his failure to testify at the preliminary hearing deprived defendant of a fair trial and was a denial of due process. State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971).

19-809A. Child's out of court statements admissible in preliminary examinations. — Notwithstanding the provisions of sections 19-808 and 19-809, Idaho Code, and any rules promulgated by the Idaho supreme court, in any preliminary examination, the magistrate shall receive into evidence any out-of-court statement of a child under the age of ten (10) years provided the magistrate finds the source of the evidence credible. [I.C., § 19-809A, as added by 1986, ch. 195, § 1, p. 493.]

19-810. Exclusion of witnesses. — While a witness is under examination the magistrate must, upon motion of either of the parties, exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until all witnesses have been examined. [Cr. Prac. 1864, § 157; R.S., R.C., & C.L., § 7574; C.S., § 8752; I.C.A., § 19-710; am. 1969, ch. 467, § 5, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Discretion of Court.

In the absence of specific authority, the trial judge's duty to cause witnesses to be kept separate and prevented from conversing with each other is at most discretionary. State v. Lopez, 100 Idaho 99, 593 P.2d 1003 (1979).

19-811. Exclusion of other persons. — The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney general, the prosecuting attorney of the county, the defendant and his counsel, and the officer having the defendant in custody. [Cr. Prac. 1864, § 158; R.S., R.C., & C.L., § 7575; C.S., § 8753; I.C.A., § 19-711.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: Gannett Co. v. DePasquale, 443

U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

ANALYSIS

Constitutionality.

Presumption in favor of open hearings.

Refusal to exclude — Effect.

Required findings in support of closure.

Constitutionality.

This section is not unconstitutional as an infringement of the free press provisions of the first amendment to the United States Constitution and the open court mandate of Const., Art. 1, § 18. *Cowles Publishing Co. v. Magistrate Court of First Judicial Dist.*, 118 Idaho 753, 800 P.2d 640 (1990).

Since preliminary hearings are presumptively open, and considering that openness of preliminary hearings plays a significant positive role in our society, a qualified first amendment right of public access attaches to preliminary hearings. *Cowles Publishing Co. v. Magistrate Court of First Judicial Dist.*, 118 Idaho 753, 800 P.2d 640 (1990).

The right of public access to preliminary hearing can co-exist with the mandate of this section which requires a magistrate to close a preliminary hearing upon the request of the defendant; the directive of this section to close preliminary hearings is not in conflict with the first amendment right of access to preliminary hearings so long as the requirements of *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), are satisfied and complied with by the magistrate court. *Cowles Publishing Co. v. Magistrate Court of First Judicial Dist.*, 118 Idaho 753, 800 P.2d 640 (1990).

Presumption in Favor of Open Hearings.

The presumption remains that preliminary hearings will remain open absent the defendant's request and an overriding interest in a

fair trial; the right to an open public preliminary hearing and trial is a shared right of the accused and the public, with the common element and concern being the assurance of fairness, and thus, only under unusually compelling circumstances should preliminary hearings be closed. *Cowles Publishing Co. v. Magistrate Court of First Judicial Dist.*, 118 Idaho 753, 800 P.2d 640 (1990).

Refusal to Exclude — Effect.

The error of the committing magistrate in refusing to grant appellant's motion for the exclusion of all persons under the provisions of this section, allowing a newspaper reporter and several other people to remain present, was a procedural irregularity and was not a prejudicial error requiring reversal of the cause. *State v. McKenna*, 78 Idaho 647, 309 P.2d 206 (1957).

Required Findings in Support of Closure.

Once a defendant requests that a preliminary hearing be closed pursuant to this section, the preliminary hearing may be closed if the magistrate makes the specific findings on the record that there is, first, a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. *Cowles Publishing Co. v. Magistrate Court of First Judicial Dist.*, 118 Idaho 753, 800 P.2d 640 (1990).

19-812. Transcript of preliminary examination. — In all cases which must afterward be investigated by the grand jury, or prosecuted by information, the preliminary examination must be taken and as ordered by the district court duly transcribed, unless the person charged with the offense shall waive his right to such examination, and the same can not be unreasonably delayed by either party.

A verbatim record of the proceedings and evidence at the preliminary examination before a magistrate shall be maintained either by electrical devices or by stenographic means as the magistrate may direct, but if any party to the action requests stenographic reporting of the proceedings, the reporting shall be done stenographically. The requesting party shall pay the costs of reporting the proceedings.

The opening statements and closing argument of counsel for the parties need not be transcribed and made a part of the transcript unless the transcription of the same is requested in advance by either of such parties.

The transcript of the proceedings and evidence at the preliminary examination shall be certified to as true and correct by the stenographer or by the person designated to transcribe the proceedings from the electrical devices. [R.S., § 7576; am. 1905, p. 376; reen. R.C., § 7576; compiled and reen. C.L., § 7576; C.S., § 8754; I.C.A., § 19-712; am. 1969, ch. 467, § 6, p. 1339; am. 1971, ch. 73, § 1, p. 167; am. 1979, ch. 206, § 1, p. 589.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S.L. 1971, ch. 73 declared an emergency. Approved March 8, 1971.

Cross ref. County stenographer's presence may be required at preliminary examinations, §§ 31-2609, 31-2610.

Sec. to sec. ref. This section is referred to in § 19-825.

Cited in: *Territory v. Evans*, 2 Idaho (Hasb.) 651, 23 P. 232, 7 L.R.A. 646 (1890); *State v. Potter*, 6 Idaho 584, 57 P. 431 (1899); *State v. Zarlenga*, 14 Idaho 305, 94 P. 55 (1908); *State v. Peterson*, 87 Idaho 147, 391 P.2d 846 (1964); *State v. Mee*, 102 Idaho 474, 632 P.2d 663 (1981).

ANALYSIS

Certification.
 Illegal detention.
 Indigent persons.
 Provisions mandatory.
 Sufficiency of authentication.
 Transcript.
 Waiver.

Certification.

Committing magistrate may amend his certificate to the depositions with leave of court at county seat although county seat is outside of his precinct. *State v. McGann*, 8 Idaho 40, 66 P. 823 (1901).

The transcript of a preliminary hearing must be certified as true and correct by a judicial officer or reporter because failure to have the transcript certified will make it unacceptable for review by a higher court. *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976).

Illegal Detention.

Under the circumstances where appellant had not been granted a preliminary hearing for 36 days nor allowed to contact his mother for over 30 days, it was incumbent on the trial court to have issued a writ of habeas corpus to inquire into the question of such imprisonment or restraint for full determination of the legality of his imprisonment or restraint in view of the constitutional guaranty of his right to a speedy and public trial. *Johnson v. State*, 85 Idaho 123, 376 P.2d 704 (1962).

Indigent Persons.

A preliminary hearing transcript, when alleged to be necessary to the defense, must be included among the services and facilities provided by the state to indigents under § 19-852. *State v. Kay*, 108 Idaho 661, 701 P.2d 281 (Ct. App. 1985).

Provisions Mandatory.

This section is mandatory in its requirements as to a preliminary examination, and the district court has no jurisdiction to try a person on information until this section is complied with. *State v. Braithwaite*, 3 Idaho 119, 27 P. 731 (1891); *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912); *State v. Carlson*, 23 Idaho 545, 130 P. 463 (1913).

Sufficiency of Authentication.

Editor's note: The following cases were decided prior to the 1971 amendment that changed the method of copying the transcript.

Where record shows before whom the preliminary examination was had; date of such examination; presence of defendant; reading of complaint to defendant and his plea thereto; that each witness stated his name, age, residence, and occupation; and contains questions put to each witness, and answers thereto, and each deposition is signed by witness and has a jurat signed by magistrate, and further shows that depositions are basis of the information filed by district attorney, the law is substantially complied with, although depositions do not contain the certificate of magistrate. *State v. Clark*, 4 Idaho 7, 35 P. 710 (1894).

This section must be substantially complied with, and magistrate is required to make a final certificate that its requirements have been complied with. Magistrate is not required to attach a separate certificate to testimony of each witness. *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912).

Where evidence is taken by county stenographer and transcribed and certified by him, certificate of magistrate to testimony becomes unnecessary. *State v. Carlson*, 23 Idaho 545, 130 P. 463 (1913).

Motion to quash information on ground that depositions on preliminary hearing were not taken by county stenographer is properly denied when it appears that they were signed by stenographer under subsequently acquired married name. *State v. Weir*, 41 Idaho 345, 238 P. 1029 (1925).

Certificate of transcript of testimony taken at preliminary hearing by acting stenographer and probate judge was in full compliance with this section. *State v. Miller*, 52 Idaho 33, 10 P.2d 955 (1932).

Certification of deposition by stenographer who erroneously described herself as county stenographer, but which was also certified by the magistrate, was properly authenticated. *State v. Rutten*, 73 Idaho 25, 245 P.2d 778 (1952).

The fact that the committing magistrate failed to certify transcript of preliminary hearing and to make an order finding that a crime had been committed and that there was probable cause to believe petitioner committed such crime, being mere defects of form in the warrant of commitment, did not entitle

the prisoner to release under habeas corpus writ. *State v. Stewart*, 87 Idaho 210, 392 P.2d 180 (1964).

Transcript.

Where a defendant, who was subsequently convicted of voluntary manslaughter entirely on the basis of circumstantial evidence, was denied a transcript of the preliminary hearing despite his request for such a transcript, the denial was prejudicial error under this section. *State v. Coronado*, 98 Idaho 421, 565 P.2d 1378 (1977).

Waiver.

After issuance of valid commitment and information filed, jurisdiction of district court does not depend on complaint before magistrate and defects therein are immaterial. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

Defendant may waive his right to preliminary examination without advice of counsel, provided the waiver is made voluntarily,

knowingly and intelligently. *Smith v. State*, 94 Idaho 469, 491 P.2d 733 (1971).

The defendant effectively waived compliance with the preliminary hearing requirement, where the district judge asked the defendant if he gave up the right to a preliminary hearing, the defendant indicated he had, and this question was preceded by an explanation of the right to a preliminary hearing. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

The right to a preliminary hearing can be waived, and a waiver made voluntarily, knowingly and intelligently is effective even in the absence of advice of counsel. *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

Collateral References. Use in criminal case of testimony given on former trial, or preliminary examination, by witness not available at present trial. 15 A.L.R. 495; 21 A.L.R. 662; 79 A.L.R. 1392; 122 A.L.R. 425; 159 A.L.R. 1240.

19-813. Custody of transcript of preliminary examination. — The magistrate must keep the depositions of witnesses or transcript of preliminary examination taken at such preliminary examination until the same is returned to the proper court; and such magistrate must not permit the same to be examined or copied by any person except a judge of a court having jurisdiction of the offense, or authorized to issue writs of habeas corpus, the attorney-general, prosecuting attorney, or other prosecuting attorney, and the defendant and his counsel. [R.S., R.C., & C.L., § 7577; C.S., § 8755; I.C.A., § 19-713; am. 1969, ch. 467, § 7, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Ruddell*, 97 Idaho 436, 546 P.2d 391 (1976).

19-814. Discharge of defendant. — If, after hearing the evidence adduced at the preliminary examination, the magistrate finds either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must dismiss the complaint and order the defendant to be discharged. [Cr. Prac. 1864, § 159; R.S., R.C., & C.L., § 7578; C.S., § 8756; I.C.A., § 19-714; am. 1969, ch. 467, § 8, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Carlson*, 23 Idaho 545, 130 P. 463 (1913); *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

ANALYSIS

Burden of proof.
Discharge on habeas corpus.
In general.
Probable cause.
Sufficiency of evidence.

Burden of Proof.

The defendant is under no duty to present any evidence at the preliminary hearing

though he may do so, and the state has the burden of proof of meeting the requirements of the statute. *State v. Haggard*, 94 Idaho 249, 486 P.2d 260 (1971).

At the preliminary hearing the State is not required to prove the defendant guilty beyond a reasonable doubt. Rather, it need only show that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Discharge on Habeas Corpus.

Upon petition for writ of habeas corpus court can go back of order of commitment and inquire into question of probable cause. In re Baugh, 30 Idaho 387, 164 P. 529 (1917).

In General.

In a trial for obtaining money under false pretenses, where the defendant was charged with being an accomplice of another who had been discharged on preliminary examination, it was not error to instruct the jury that proceedings had in a preliminary examination do not constitute proof of either guilt or innocence of the person charged and dismissal of the criminal charge therein does not constitute a bar to a subsequent prosecution for the same offense if additional proof should

later become available. *State v. Urie*, 92 Idaho 71, 437 P.2d 24 (1968).

Probable Cause.

Court, in defendant's aggravated assault case, erred by dismissing the charge where there was probable cause to try defendant on the charge as there was substantial evidence that defendant intended to make a threat to a roommate during a game of Russian roulette. *State v. Pole*, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

Sufficiency of Evidence.

When the State charges a person with a felony, unless he is indicted by a grand jury, the defendant is entitled to a preliminary hearing to determine if there is sufficient evidence to warrant holding him to answer in the district court. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

The denial of a motion to dismiss following a preliminary hearing will not be disturbed on appeal if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

19-815. Holding defendant to answer. — If, after hearing the evidence adduced at the preliminary examination, the magistrate finds that a public offense has been committed, and that there is probable or sufficient cause to believe the defendant guilty thereof, the magistrate shall enter an order holding the defendant to answer to said public offense, which order shall be substantially as follows: "It appearing to me that the offense set forth in the complaint (or any offense, according to the evidence presented at the preliminary examination, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within named A.B. guilty thereof, I order that he be held to answer the same." [Cr. Prac. 1864, § 160; R.S., R.C., & C.L., § 7579; C.S., § 8757; I.C.A., § 19-715; am. 1969, ch. 467, § 9, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Carlson*, 23 Idaho 545, 130 P. 463 (1913); *State v. Mitchell*, 36 Idaho 724, 214 P. 217 (1923); *In re Moore*, 38 Idaho 506, 224 P. 662 (1924); *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

ANALYSIS

Appeals.

Failure to endorse commitment.

In general.

Multiplicity of charges.

Preliminary hearings — Effect.

Sufficiency of evidence.

Appeals.

Failure of magistrate to specify the offense for which defendant was committed could not be reviewed by court on appeal where formal order of commitment did not appear in the transcript. *State v. Rutten*, 73 Idaho 25, 245 P.2d 778 (1952).

The decision of a magistrate that there exists probable cause to bind a defendant over to district court for a trial on the charges

should be overturned only on a showing that the committing magistrate abused his discretion. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

A magistrate's commitment will not be deemed an abuse of discretion, and a district judge's denial of a motion challenging probable cause will not be disturbed on appeal, if under any reasonable view of the evidence, including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Failure to Endorse Commitment.

Fact that order of commitment is not endorsed on the depositions, does not deprive same of its validity where order is reduced to writing and entered in the official docket of magistrate. *State v. Clark*, 4 Idaho 7, 35 P. 710 (1894); *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912); *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

Fact that magistrate's commitment is in separate paper instead of being endorsed on deposition does not deprive court of jurisdiction. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

In General.

Preliminary examination is not in any sense a trial but its only purpose is to ascertain whether a crime has been committed, and whether there is probable cause for believing that accused is guilty thereof and should be tried therefor. *State v. Bond*, 12 Idaho 424, 86 P. 43 (1906).

All requirements with respect to preliminary examinations were met when the defendant was accorded a preliminary examination in which the court determined that a felony had been committed and that there was probable cause to believe that the defendant had committed it and the trial court could properly permit the addition of a count charging him with being a persistent violator without granting him a preliminary hearing on such additional allegation. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

The defendant is under no duty to present any evidence at the preliminary hearing though he may do so, and the state has the burden of proof of meeting the requirements of the statute. *State v. Haggard*, 94 Idaho 249, 486 P.2d 260 (1971).

Multiplicity of Charges.

It is not fatal that committing magistrate held defendant to answer to a number of offenses charged in a complaint. If defendant

is charged in an information with commission of a number of offenses he has ample opportunity on arraignment to object by demurrer or motion to elect and thus is not deprived of any substantial right by the joinder in the preliminary examination. *State v. Bilboa*, 33 Idaho 128, 190 P. 248 (1920).

Preliminary Hearings — Effect.

Respondent having waived a preliminary hearing, was not in a position to complain of not being able to ascertain the facts on which the charge was based. *State v. Hendricks*, 80 Idaho 344, 330 P.2d 334 (1958).

When a preliminary hearing is had the information thereafter filed in the district court does not depend on the complaint filed with the committing magistrate but on the commitment and the facts shown by the preliminary hearing. *State v. Hendricks*, 80 Idaho 344, 330 P.2d 334 (1958).

In cases where a defendant, accused of a public offense triable in the district court, waives preliminary hearing, no depositions to support the charge in the district court are required. The accused in such circumstances is held to answer for the crime charged in the criminal complaint filed with the committing magistrate. *State v. Hendricks*, 80 Idaho 344, 330 P.2d 334 (1958).

A defendant charged with a crime and having been arrested and brought before a magistrate, where the offense charged is one that is triable in the district court, may demand a preliminary hearing, or waive the right to such hearing. *State v. Hendricks*, 80 Idaho 344, 330 P.2d 334 (1958).

The state is not required to produce all of its evidence at a preliminary hearing as it is sufficient if the state produces enough to satisfy the committing magistrate that a crime has been committed and there is reasonable or probable cause to believe the accused committed it. *State v. O'Bryan*, 96 Idaho 548, 531 P.2d 1193 (1975).

At the preliminary hearing the State is not required to prove the defendant guilty beyond a reasonable doubt. Rather, it need only show that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Sufficiency of Evidence.

On preliminary examination it is only necessary for state to introduce sufficient evidence to satisfy magistrate that a public offense has been committed and that defendant is guilty thereof in order to justify magistrate in holding defendant to answer. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

In preliminary examination, state is not bound to produce all of its evidence or to establish guilt of accused "beyond a reason-

able doubt," and if it produces sufficient to satisfy committing magistrate that a crime has been committed, and that there is reasonable or probable cause to believe that petitioner committed it, it is the duty of magistrate to hold petitioner for trial. In re Squires, 13 Idaho 624, 92 P. 754 (1907); State v. Layman, 22 Idaho 387, 125 P. 1042 (1912).

Petitioner was properly held on charge of burglary where evidence at preliminary hearing showed that he pried open a locked window and entered darkened house of people away from home though police stationed inside arrested him before he could steal anything. Ex parte Seyfried, 74 Idaho 467, 264 P.2d 685 (1953).

If the state produces evidence sufficient to satisfy the examining magistrate that a crime has been committed and to lead a reasonable person to believe the accused party has probably or likely committed the offense charged, it is the duty of the magistrate to hold the accused for trial. Martinez v. State, 90 Idaho 229, 409 P.2d 426 (1965).

Evidence that defendant shot and killed the victim was sufficient to sustain action of the probate judge in binding defendant over to the district court on a charge of first degree murder even though the evidence also showed that defendant did so while intoxicated and in a short altercation. Carey v. State, 91 Idaho 706, 429 P.2d 836 (1967).

Magistrate's decision that there existed probable cause to hold defendant for trial on charge of unlawful possession of a controlled substance with the intent to deliver was abuse of discretion where there was no evidence at the preliminary hearing before the magistrate of the intent of the defendant to deliver and such intent could not be inferred solely from the defendant's possession of a controlled substance. State v. O'Mealey, 95 Idaho 202, 506 P.2d 99 (1973).

The state at a preliminary examination is not required to show the defendant guilty

beyond a reasonable doubt; it need only prove that a crime was committed and that there is probable cause to believe the accused committed it. State v. Greensweig, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

Where state presented evidence at preliminary hearing that heifer reported lost by owner was same animal received by third person in exchange for labor performed, that county sheriff had learned during investigation that defendant had sold heifer to third party and had discovered owner's brand on animal, and that third party produced bill of sale from defendant, there was sufficient probable cause under § 19-804 and this section to bind defendant over to district court for trial. State v. Owens, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

When the State charges a person with a felony, unless he is indicted by a grand jury, the defendant is entitled to a preliminary hearing to determine if there is sufficient evidence to warrant holding him to answer in the district court. State v. Holcomb, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

The denial of a motion to dismiss following a preliminary hearing will not be disturbed on appeal if, under any reasonable view of the evidence including permissible inferences, it appears likely that an offense occurred and that the accused committed it. State v. Holcomb, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Court, in defendant's aggravated assault case, erred by dismissing the charge where there was probable cause to try defendant on the charge as there was substantial evidence that defendant intended to make a threat to a roommate during a game of Russian roulette. State v. Pole, — Idaho —, 79 P.3d 729 (Ct. App. 2003), review denied, — P.3d — (Nov. 30, 2003).

19-815A. Challenging sufficiency of evidence of preliminary examination. — A defendant once held to answer to a criminal charge under this chapter may challenge the sufficiency of evidence educed at the preliminary examination by a motion to dismiss the commitment, signed by the magistrate, or the information filed by the prosecuting attorney. Such motion to dismiss shall be heard by a district judge.

If the district judge finds that the magistrate has held the defendant to answer without reasonable or probable cause to believe that the defendant has committed the crime for which he was held to answer, or finds that no public offense has been committed, he shall dismiss the complaint, commitment or information and order the defendant discharged. [I.C., § 19-815A, as added by S.L. 1971, ch. 250, § 1, p. 1005.]

Cited in: *State v. Griffith*, 101 Idaho 315, 612 P.2d 552 (1980); *State v. Molinelli*, 105 Idaho 833, 673 P.2d 433 (1983); *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

ANALYSIS

Appeal.

Burden of proof.

Conditional pleas.

—Reservation of right to appeal.

Evidence.

Sufficiency of evidence.

—Test.

Time for challenge.

Appeal.

Where district court remanded case to magistrates' division on ground that there was insufficient evidence before magistrate to establish probable cause because affidavit of banker was hearsay and defendant was not able to cross-examine witness under former I.C.R. 5.1(a), such decision of district court was not appealable. *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974).

A dismissal of charges under this section was not an appealable order under § 19-2804 (now repealed). *State v. Holtry*, 98 Idaho 140, 559 P.2d 756 (1977).

Where prior to trial the defendant moved to dismiss one of the counts against him on the grounds that the evidence produced at the preliminary hearing did not establish probable cause, the trial court's denial of the motion to dismiss that count was not an appealable order since the defendant was not appealing from a judgment of conviction, because the jury failed to reach a verdict on that count, nor was he appealing from any other final order in respect to that count. *State v. Garner*, 103 Idaho 468, 649 P.2d 1224 (Ct. App. 1982).

A magistrate's commitment will not be deemed an abuse of discretion, and a district judge's denial of a motion challenging probable cause will not be disturbed on appeal, if under any reasonable view of the evidence, including permissible inferences, it appears likely that an offense occurred and that the accused committed it. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Burden of Proof.

The state at a preliminary examination is not required to show the defendant guilty beyond a reasonable doubt; it need only prove that a crime was committed and that there is probable cause to believe the accused committed it. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

Conditional Pleas.

—Reservation of Right to Appeal.

Although convictions for defects of proof in the preliminary hearing have not been overturned when at a fair trial the accused was found guilty upon sufficient evidence to sustain the verdict, where defendant entered a conditional plea specifically reserving the right to appeal the admission of evidence admitted during his preliminary hearing, where the evidence in question was improperly admitted, judgment of conviction was reversed. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Evidence.

Where, at preliminary hearing on charge of unlawful possession of a controlled substance with intent to deliver, no testimony was offered of the actual, constructive or attempted transfer of a controlled substance from the defendant to any other person and there was no evidence of intent to transfer, district court properly sustained defendant's motion to dismiss the information. *State v. O'Mealey*, 95 Idaho 202, 506 P.2d 99 (1973).

Although the law in effect at the time of defendant's prosecution for lewd conduct with a minor under 16 required corroboration of the victim's testimony, the corroboration could be either direct evidence or evidence of surrounding circumstances clearly corroborating her statements; therefore, where the character or reputation of the minor victim was unimpeached for truth and chastity and her testimony was not contradictory nor inconsistent with the admitted facts, sufficient corroborating evidence to show that defendant was the perpetrator of the crime was supplied by his ownership of a car described by the minor victim, the identification of defendant by another girl who was victimized by defendant in an almost identical crime, and evidence of other surrounding circumstances clearly corroborating the victim's description of the acts making up the crime. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

Sufficiency of Evidence.

Where an officer involved in a vehicle search performed at the police station testified that he had extensive experience in drug enforcement, where he stated that in his opinion, the chemicals and equipment found in the vehicle could be used to manufacture methamphetamine, where the chemicals and equipment were found in a vehicle occupied by defendants, and where the state submitted evidence that in preparation for departure, defendant and co-defendant had left with an empty vehicle and had returned to retrieve another co-defendant with a vehicle loaded with the "stuff," the state produced sufficient

evidence to support the probable inference that there was an agreement between the parties, and the magistrate did not err in finding probable cause to bind defendant over to district court for trial on charges of conspiracy to manufacture a controlled substance. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

It was not error for the district court to deny defendant's pre-trial motion to dismiss where evidence found in defendant's bedroom included zig zag papers, a bong pipe with burnt residue, twenty-six baggies containing green leafy residue, four baggies beside twenty dollar bills, books about growing marijuana and numerous pieces of paper bearing only first names and telephone numbers, and thus was sufficient to allow the magistrate to conclude there was probable cause to believe the crimes charged had occurred and that defendant had participated in the manufacture and possession of a controlled substance as a finding of probable cause need only be based on substantial evidence under I.C.R. 5.1(b). *State v. Wengren*, 126 Idaho 662, 889 P.2d 96 (Ct. App. 1995).

—Test.

The finding of probable cause must be

based upon substantial evidence with regard to every material element of the offense charged, and this test may be satisfied through circumstantial evidence and reasonable inferences to be drawn from that evidence by the committing magistrate. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

Time for Challenge.

A defendant may invoke the federal Constitution to challenge his detention without probable cause before conviction, but may not do so after a judgment of conviction has been entered. However, a defendant's remedies in Idaho are not confined to those attending rights secured by the federal Constitution; Art. 1, § 8 of the Idaho Constitution, the implementing statutes, and the interpretive case law have extended the time for reviewing challenges to the sufficiency of proof of probable cause, beyond the conviction cutoff imposed for federal constitutional challenges. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

19-816. Offenses not bailable — Endorsement on commitment. —

If the offense is not bailable the following words must be added to the commitment required by section 19-818: "and he is hereby committed to the sheriff of the county of _____." [Cr. Prac. 1864, § 161; R.S., R.C., & C.L., § 7580; C.S., § 8758; I.C.A., § 19-716; am. 1969, ch. 467, § 10, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Offenses not bailable, § 19-2903.

19-817. Bailable offenses — Order admitting to bail. — If the offense is bailable, and the defendant is admitted to bail, the following words must be added to commitment required by section 19-818: "And that he is admitted to bail in the sum of _____ dollars, and is committed to the sheriff of the county of _____ until he gives such bail." [Cr. Prac. 1864, § 163; R.S., R.C., & C.L., § 7581; C.S., § 8759; I.C.A., § 19-717; am. 1969, ch. 467, § 11, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Bailable offenses, § 19-2904.

19-818. Order of commitment. — If the magistrate order the defendant to be committed he must make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom

he is committed, or, if that officer is not present, to a peace officer, who must deliver the defendant into the proper custody, together with the commitment. [Cr. Prac. 1864, § 164; R.S., R.C., & C.L., § 7582; C.S., § 8760; I.C.A., § 19-718.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-816.

19-819. Form of commitment. — The commitment must be to the following effect:

County of (as the case may be). The state of Idaho to the sheriff of the county of _____:

An order having been this day made by me, that A. B. be held to answer upon a charge of (stating briefly the nature of the offense, and giving as near as may be the time when and the place where the same was committed), you are commanded to receive him into your custody and detain him until he is legally discharged.

Dated this _____ day of _____, 19 _____. [Cr. Prac. 1864, § 165; R.S., R.C., & C.L., § 7583; C.S., § 8761; I.C.A., § 19-719.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-820. Undertaking of witnesses to appear. — On holding the defendant to answer, the magistrate may take from each of the material witnesses examined before him on the part of the people a written undertaking to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of \$500.00. [Cr. Prac. 1864, § 166; R.S., R.C., & C.L., § 7584; C.S., § 8762; I.C.A., § 19-720.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Bail for witnesses, I.C.R. 46.1.

19-821. Security for appearance. — When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section. [Cr. Prac. 1864, § 167; R.S., R.C., & C.L., § 7585; C.S., § 8763; I.C.A., § 19-721.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Zarlenga, 14 Idaho 305, 94 P. 55 (1908); State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981).

19-822. Security for appearance — Infants and married women.

— Infants and married women who are material witnesses against the defendant may be required to procure sureties for their appearance, as provided in the last section. [Cr. Prac. 1864, § 168; R.S., R.C., & C.L., § 7586; C.S., § 8764; I.C.A., § 19-722.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-823. Commitment for failure to give security. — If a witness, required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the magistrate must commit him to prison until he complies or is legally discharged. [Cr. Prac. 1864, § 169; R.S., R.C., & C.L., § 7587; C.S., § 8765; I.C.A., § 19-723.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-824. Conditional examination. — When, however, it satisfactorily appears by examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people. Such examination must be by question and answer in the presence of the defendant, or after notice to him, if on bail, and conducted in the same manner as the examination before a committing magistrate is required by this chapter to be conducted, and the witness thereupon be discharged; but this section does not apply to an accomplice in the commission of the offense charged. [Cr. Prac. 1864, § 170; R.S., R.C., & C.L., § 7588; C.S., § 8766; I.C.A., § 19-724.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Right of person held to answer public offense to have witnesses examined conditionally, § 19-3101.

Cited in: Territory v. Evans, 2 Idaho (Hasb.) 651, 23 P. 232, 7 L.R.A. 646 (1890); State v. Mee, 102 Idaho 474, 632 P.2d 663 (1981).

Use of Deposition.

Deposition in a criminal case taken under provisions of this section is admissible as

evidence. State v. White, 7 Idaho 150, 61 P. 517 (1900).

Deposition may be used if it is first shown that due diligence has been ineffectually exercised to procure attendance of witness. State v. Ireland, 9 Idaho 686, 75 P. 257 (1904).

Before deposition taken conditionally can be admitted in evidence, state must show that deposition was taken before magistrate who conducted the preliminary examination or judge of court to which defendant has been held for trial; that it was shown to such magistrate or judge, on oath, that there was reason to believe that such witness whose deposition was sought would not appear and testify unless security was given; that order was made requiring such witness to enter into a written undertaking, with sureties, under

§ 19-821; that thereupon it was shown that witness was unable to procure sureties; that defendant had been advised of his right to counsel and to be represented by such; that defendant was present in person and by counsel, if he desired counsel, or that he had notice of such examination, if on bail; that examination was conducted in same manner as exam-

ination before committing magistrate, and certified as required by § 19-812; that witness is unable to attend by reason of his death, infirmity, sickness, or insanity, or of absence from the state, and that due diligence has been exercised to procure presence of such witness at trial. *State v. Zarlenga*, 14 Idaho 305, 94 P. 55 (1908).

19-825. Return of papers to district court. — When a magistrate has held a defendant to answer for the commission of a public offense, he must, without unnecessary delay and after the transcript of preliminary examination has been transcribed or the depositions of witnesses have been reduced to writing in compliance with section 19-812, Idaho Code, return to the clerk of the district court to which the defendant has been held to answer, the complaint, the warrant, if any, the transcript of preliminary examination or depositions of witnesses testifying at the preliminary examination, a certified copy of the transcript of his docket, the order holding defendant to answer, all undertakings of bail or for the appearance of witnesses taken by him, together with any other written documents on file which the magistrate is required by law to transmit to said district court. [Cr. Prac. 1864, § 172; R.S., R.C., & C.L., § 7589; C.S., § 8767; I.C.A., § 19-725; am. 1969, ch. 467, § 12, p. 1339.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959); *State v. Ruddell*, 97 Idaho

436, 546 P.2d 391 (1976).

Delay in Return Not Jurisdictional.

Where magistrate delayed returning papers for more than five months, it was held that while statute could have been enforced by appropriate proceedings, such delay was not jurisdictional. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

19-826 — 19-850. [Reserved.]

19-851. Right to representation by counsel — Definitions. — In this act, the term:

(a) "Detain" means to have in custody or otherwise deprive of freedom of action;

(b) "Expenses," when used with reference to representation under this act, includes the expenses of investigation, other preparation, and trial;

(c) "Needy person" means a person who, at the time his need is determined, is unable to provide for the full payment of an attorney and all other necessary expenses of representation;

(d) "Serious crime" includes:

(1) a felony;

(2) any misdemeanor or offense the penalty for which, excluding imprisonment for non-payment of a fine, includes the possibility of confinement for more than six (6) months. [1967, ch. 181, § 1, p. 599; am. 1968 (2nd E. S.), ch. 10, § 1, p. 20; am. 1972, ch. 27, § 1, p. 39; am. 1972, ch. 385, § 1, p. 1117; am. 1995, ch. 59, § 1, p. 130.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

Section 2 of S.L. 1972, ch. 27 declared an emergency. Approved February 28, 1972.

Section 2 of S.L. 1972, ch. 385 declared an emergency. Approved March 31, 1972.

Cross ref. Right to assignment of counsel, I.C.R. 44.

Sec. to sec. ref. This section is referred to in § 19-858.

Cited in: *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979); *State v. Weaver*, 135 Idaho 5, 13 P.3d 5 (Ct. App. 2000); *State v. Suiter*, 138 Idaho 662, 67 P.3d 1274 (Ct. App. 2003).

ANALYSIS

Denial of counsel.

—Improper.

"Needy person."

—Burden of showing need.

—Need not shown.

Right to counsel.

Denial of Counsel.

Absent a knowing and intelligent waiver, no sentence of incarceration may be imposed when counsel has been denied a defendant found needy after a review conducted in full compliance with §§ 19-851(b), (c) and 19-854(b). *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972).

Defendant's failure to produce proof of liability insurance would not require the court to appoint counsel because the offense did not carry a sufficient penalty to classify it as a "serious" offense within § 19-852. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

—Improper.

The magistrate court erred by denying defendant's right to counsel when it did not appoint counsel to help with his defense to the charge of delaying and obstructing a peace officer. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

"Needy Person."

—Burden of Showing Need.

The initial burden rests upon defendant to demonstrate to the court's satisfaction his inability to advance or secure costs to pay for transcript; once defendant makes such a showing, the state must come forward with substantial factual evidence of defendant's ability to pay, in whole or in part, the necessary costs. *State v. Randles*, 109 Idaho 933, 712 P.2d 634 (1985).

—Need Not Shown.

The district court did not abuse its discretion in denying motion for county payment of transcript costs on appeal where defendants were purchasing property valued at \$10,600 and they owned two vehicles worth \$600. *State v. Randles*, 109 Idaho 933, 712 P.2d 634 (1985).

Right to Counsel.

One convicted of driving under the influence of intoxicating liquor was not prejudiced by the failure of the state to provide him with counsel immediately after his arrest, thereby preventing his counsel from securing a timely test of his blood for alcoholic content. *State v. Reyna*, 92 Idaho 669, 448 P.2d 762 (1968).

The district court properly declined to appoint counsel to represent accused at his post-conviction relief hearing where the accused refused to furnish further information about his financial condition and pension which he admitted he received. *Quinlivan v. State*, 94 Idaho 334, 487 P.2d 928 (1971).

When defendant and 15 other prison inmates were placed in maximum security during the sheriff's investigation of the murder of a fellow inmate the matter was still in its investigatory stage and not its accusatory stage and thus defendant did not then acquire the right to have the public defender informed of his detention nor the right to have counsel represent him. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Appeals.

Attorney fees limited.

Construction.

Request for attorney's fees.

Right to counsel.

Appeals.

Where defendant appeals from the lower court to the district court, and he is poor and unable to procure the services of counsel, it is

the duty of the district court to appoint counsel for his defense, even though proceedings were upon a "complaint" and not upon an indictment or "information." *State v. Eikelberger*, 70 Idaho 271, 215 P.2d 996 (1950).

Attorney Fees Limited.

The allowance for attorney fees and expenses made by the former section was limited to the trial of the case and not to proceedings for writ of habeas corpus or writ of error

coram nobis. State v. Thurlow, 85 Idaho 96, 375 P.2d 996 (1962).

Construction.

The term "indictment or information," is used in a generic sense and includes a "complaint" upon an appeal from the lower court to the district court. State v. Eikelberger, 70 Idaho 271, 215 P.2d 996 (1950).

Request for Attorney's Fees.

The request for attorney fees must be presented to the trial court in the first instance before such request is made to the Supreme Court. State v. Thomas, 82 Idaho 473, 355 P.2d 674 (1960).

Right to Counsel.

It is incumbent upon the court upon an arraignment for an offense such as lewd and lascivious conduct to ascertain if the defendant is financially capable of hiring counsel and to advise the defendant in order that he may intelligently respond to the court's interrogation upon this subject. Unless informed of these statutory rights it is conceivable that defendant would not know of their existence and his inability to employ counsel would operate to deny him the opportunity to assert defenses to the charge in violation of his rights of due process. State v. Thurlow, 85 Idaho 96, 375 P.2d 996 (1962).

Where certain factors exist which may render state criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the constitution requires the accused must have legal assistance

at his trial, such factors being the age and education of the defendant, the conduct of the court, the complicated nature of the offense charged and the possible defenses thereto. State v. Thurlow, 85 Idaho 96, 375 P.2d 996 (1962).

Collateral References. Duty to advise accused as to right to assistance of counsel. 3 A.L.R.2d 1003.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 A.L.R.2d 747.

Accused's right to assistance of counsel at or prior to arraignment. 5 A.L.R.3d 1269.

Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused. 18 A.L.R.3d 1074.

Construction and effect of statutes providing for office of public defender. 36 A.L.R.3d 1403.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt. 38 A.L.R.3d 1221.

Determination of indigency of accused entitling him to appointment of counsel. 51 A.L.R.3d 1108.

Accused's right to choose particular counsel appointed to assist him. 66 A.L.R.3d 996.

Accused's right to represent himself in state criminal proceeding — modern state cases. 98 A.L.R.3d 13.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel. 19 A.L.R.5th 351.

19-852. Right to counsel of needy person — Representation at all stages of criminal and commitment proceedings — Payment. —

(a) A needy person who is being detained by a law enforcement officer, who is confined or is the subject of hospitalization proceedings pursuant to sections 18-212, 18-214, 66-322, 66-326, 66-329 or 66-409, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation). The attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines need, unable to provide for their payment.

(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation;

(2) to be represented in any appeal;

(3) to be represented in any other post-conviction or post-commitment proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

(c) A needy person's right to a benefit under subsection (a) or (b) is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage. [1967, ch. 181, § 2, p. 599; am. 1969 (2nd E.S.), ch. 10, § 2, p. 20; am. 1981, ch. 114, § 3, p. 169; am. 1982, ch. 59, § 3, p. 91.]

Legislative Intent. Section 1 of S.L. 1981, ch. 114 read: "It is hereby declared by the legislature of the state of Idaho that its mentally disabled citizens are entitled to be diagnosed, cared for, and treated in as expedient a manner possible consistent with their legal rights, in a setting no more restrictive than their protection and the protection of society require, for a period no longer than reasonably necessary for diagnosis, care, treatment and protection, and to remain at liberty or be cared for privately except when necessary for the protection of themselves or society."

Compiler's notes. Section 18-214 referred to in subsection (a) was repealed. For present law see § 18-207.

The words in parentheses so appeared in the law as enacted.

Section 2 of S.L. 1981, ch. 114 contained a repeal.

Section 2 of S.L. 1982, ch. 59 is compiled as § 15-5-101.

Sec. to sec. ref. This section is referred to in §§ 19-625, 19-854, 19-858.

Cited in: *State v. Fisk*, 92 Idaho 675, 448 P.2d 768 (1968); *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995); *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994); *Jakoski v. State*, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001).

ANALYSIS

Additional counsel.

Application.

Attorney fees.

Child psychologist.

Choosing counsel.

Counsel during probation revocation hearing.

Denial of counsel.

— Failure to address request.

— Improper.

Effectiveness of counsel.

Establishing status.

Fugitive from another jurisdiction.

Habeas corpus.

Harmless error.

In general.

Necessary services.

Private investigator.

Reimbursement.

Requests for assistance.

Self-representation.

Transcript.

Use of public funds.

Additional Counsel.

Where defendant was provided with an attorney at public expense, his request for additional counsel was a matter committed to the sound discretion of the trial court. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Application.

By its own terms, Idaho Code § 19-852 applies only to criminal and commitment proceedings, not civil actions such as habeas proceedings. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

Attorney Fees.

An application for attorney's fees for counsel appointed to represent a defendant should not be considered by the Supreme Court on appeal from defendant's conviction until such application has first been made to the trial court. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Where an attorney rendered the defense valuable services despite the fact that he had not been appointed defense counsel, the award of \$4,000 as attorney fees was not clearly erroneous as insufficient, even though the attorney invested a great deal of time and effort in the case. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Child Psychologist.

The court did not abuse its discretion by denying defendant's request for appointment of a child psychologist to examine a young victim regarding the victim's ability to per-

ceive events correctly and to report them accurately, as during the trial there was no credible evidence indicating that the child was impaired with regard to these abilities. *State v. Bingham*, 116 Idaho 415, 776 P.2d 424 (1989).

Choosing Counsel.

An indigent's right to court-appointed counsel includes the right to effective assistance of counsel, but it does not necessarily include the right to counsel of one's own choosing. *State v. Browning*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992).

Counsel During Probation Revocation Hearing.

There is a federal constitutional right to be represented by retained counsel at a probation revocation hearing; accordingly, a needy person has the right to be represented by appointed counsel at such a hearing under this section. *State v. Young*, 122 Idaho 278, 833 P.2d 911 (1992).

Denial of Counsel.

Defendant's failure to produce proof of liability insurance would not require the court to appoint counsel because the offense did not carry a sufficient penalty to classify it as a "serious" offense within this section. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

The district court did not abuse its discretion when it denied the defendant's request for court-appointed counsel, where the only issue before the court was a claim that defense counsel should have filed an I.C.R. 35 motion and the court found that claim to be frivolous and one that a "reasonable person with adequate means would not bring." *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

—Failure to Address Request.

Where the district court was aware that a petitioner had been incarcerated for over five years and was represented by a public defender in the previous proceeding, the district court erred in not addressing petitioner's request for a court-appointed attorney. *Henderson v. State*, 123 Idaho 51, 844 P.2d 33 (Ct. App. 1992).

Where defendant's Rule 35 motion was without merit, he was not entitled to appointment of counsel to represent him on the motion, and the district court's error in failing to address defendant's request for counsel prior to denial of his Rule 35 motion was harmless. *State v. Wade*, 125 Idaho 522, 873 P.2d 167 (Ct. App. 1994).

—Improper.

The magistrate court erred by denying defendant's right to counsel when it did not appoint counsel to help with his defense to the

charge of delaying and obstructing a peace officer. *State v. Hardman*, 120 Idaho 667, 818 P.2d 782 (Ct. App. 1991).

Although § 19-4904, as amended, no longer mandates appointment of counsel in post-conviction proceedings, this section provides that a needy person convicted of a serious crime is entitled to be represented unless the court determines that the proceeding is frivolous. Therefore, the district court erred by denying appointment of counsel, by not mentioning this section, or finding that defendant's petition for post-conviction relief was frivolous. *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001).

Defendant and his wife, whose duty of support to defendant required her to help pay for his defense, had insufficient resources to provide payment for an attorney and other necessary expenses to defend against his criminal charges; thus, defendant was entitled to court-appointed counsel for his jury trial and the lower court was reversed. *State v. Suiter*, 138 Idaho 662, 67 P.3d 1274 (Ct. App. 2003).

Effectiveness of Counsel.

Where the record was completely devoid of any hint of counsel's incompetence or his alleged inability to render effective assistance of counsel, the court was not required to conduct a detailed inquiry into the question of counsel's lack of "desire" to be competent or into the source of any attorney-client conflict; furthermore the trial judge should not be required to act as advocate for the defendant in a criminal proceeding, for his only obligation was to afford defendant a full and fair opportunity to present the facts and reasons in support of his motion for substitution of counsel after having been made aware by the court of the problems involved. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

Where record indicated that a plea resulted from negotiations with the state during which the state agreed to reduce a felony grand theft charge to a misdemeanor in exchange for a guilty plea on the delivery charge, these facts did not support a claim of ineffective assistance of counsel on the basis the defendant was not advised of defenses she might have had. *State v. Marks*, 119 Idaho 64, 803 P.2d 565 (Ct. App. 1991).

Appeal for post-conviction relief on ground of ineffective assistance of counsel in that counsel was not effective because he failed to file a petition for review to the Supreme Court following Court of Appeals' opinion arguing that his conviction should be reentered anew, since he has not been denied an appeal as the stage of appellate process he challenges is the last discretionary step, not the first step, which is a matter of right. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App.), *aff'd*, 127 Idaho 685, 905 P.2d 86 (1995).

Appeal for post-conviction relief on ground of ineffective assistance of counsel in that counsel was not effective because he failed to file a petition for review to the Supreme Court following Court of Appeals' opinion, seeking an extension of the time limit for filing petition of review with Supreme Court was denied for Court of Appeals could not waive the time constraints of I.A.R. 118 on behalf of the Supreme Court which alone has the authority to suspend the time limits surrounding the filing of a petition for review. *Hernandez v. State*, 127 Idaho 690, 905 P.2d 91 (Ct. App.), *aff'd*, 127 Idaho 685, 905 P.2d 86 (1995).

Where defendant did not include in the appeal from his convictions any issue that the Court of Appeals resolved unfavorably to him that could be the basis for a collateral attack in the federal courts, he has not shown the prejudice necessary to establish a successful claim of ineffective assistance of counsel based upon counsel's failure to petition Supreme Court for review of Court of Appeals' decision. *Hernandez v. State*, 127 Idaho 685, 905 P.2d 86 (1995).

Where defendant after being told about lineup requested to speak with an attorney whereupon the public defenders was called and after detention order was read to the defender he spoke to defendant telling him to cooperate in the lineup but not to answer any questions, it was more appropriate to apply a rule requiring the defendant to show that prejudice resulted from the alleged ineffectiveness of his counsel in not attending the lineup rather than to apply a *per se* rule that prejudice must be presumed to exist when counsel fails to attend a preindictment lineup. *Boman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996).

Based upon the facts of this case, it was more appropriate to apply a rule requiring the defendant to show that prejudice resulted from the alleged ineffectiveness of his counsel, rather than to apply a *per se* rule that prejudice must be presumed to exist when counsel fails to attend a preindictment lineup. *Boman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996).

Where appellate counsel did not file a petition for review before the Supreme Court and failed to notify petitioner of his right to proceed *pro se*, petitioner's request for post-conviction relief was still denied because a reasonable person would not have pursued a petition for review as the review would have lacked meritorious grounds. *Pierce v. State*, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 31 (Ct. App. Mar. 25, 2004).

Establishing Status.

Subsection (b) inherently requires that a person requesting the aid of court appointed counsel will furnish the court with all infor-

mation for its intelligent determination of the extent of individual's need. *Quinlivan v. State*, 94 Idaho 334, 487 P.2d 928 (1971).

Fugitive from Another Jurisdiction.

The fact that the Idaho peace officer making the complaints alleged that a person has committed a public offense in another jurisdiction, and is a fugitive therefrom, does not make it any less a complaint of "a public offense." *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Habeas Corpus.

Magistrate judge was correct in denying a habeas petitioner's request for counsel. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

Harmless Error.

Although district court committed error in failing to act upon defendant's motion for appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred more than a year before his application was filed and therefore frivolous; dismissal of application for post-conviction relief affirmed. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

In General.

Subsection (a) of this section includes within its scope the Fourteenth Amendment requirements of due process and equal protection as they apply to indigent defendants. The equal protection clause only requires a state to provide a defendant with "the basic tools" of an adequate defense or appeal, when those tools are available for a price to others and it does not require a state to provide a defendant with anything that he might desire for his defense merely because it may be obtained by a more financially solvent defendant; a defendant's request for expert or investigative services should be reviewed in light of all the circumstances and be measured against the standard of fundamental fairness embodied in the due process clause. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982).

Necessary Services.

It is incumbent upon the trial court to inquire into the needs of the defendant and the circumstances of the case, and then make a determination of whether an adequate defense will be available to the defendant without the requested expert or investigative aid. If the answer is in the negative, then the services are necessary and must be provided by the state. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982).

Private Investigator.

In a murder prosecution it was not error for the court to refuse to allow the defendant the

services of a private investigator under subsection (a) (2) of this section for the purpose of checking numerous witnesses where he was already allowed the services of two attorneys, who still had the bulk of their trial preparation ahead of them when the motion was made, and where the motion merely stated in conclusory fashion that the number of witnesses involved precluded effective preparation of counsel. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Reimbursement.

The district court erred by ordering defendant to reimburse the county public defender office for its services rendered, because Idaho law requires that a defendant presently have the means to pay for an attorney's services before a reimbursement award can be entered. *State v. Weaver*, 135 Idaho 5, 13 P.3d 5 (Ct. App. 2000).

Requests for Assistance.

This section does not require an ex parte application for assistance such that a request for assistance in open court is error, nor does it require that an independent judge be appointed by the trial judge to rule on requests for financial and expert assistance. *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Self-Representation.

Although a defendant has the right to reject court appointed counsel and conduct his own defense, since such a decision amounts to a waiver of the right to counsel, the defendant should be made aware of the problems inherent in self-representation so that such waiver is knowingly and intelligently made. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

Transcript.

While the parameters of the right of a criminal defendant under subdivision (a)(2) to pretrial services and facilities is not particularly defined, a transcript of the preliminary hearing, when alleged to be necessary to the defense, must certainly be included among those services and facilities provided by the state under the statute. *State v. Coronado*, 98 Idaho 421, 565 P.2d 1378 (1977).

Where a defendant who was convicted of voluntary manslaughter on the basis of circumstantial evidence was denied a transcript of the evidence taken in a preliminary hear-

ing, the denial of the defendant's request for such a transcript was prejudicial error under this section. *State v. Coronado*, 98 Idaho 421, 565 P.2d 1378 (1977).

The trial court did not commit reversible error in denying the defendant's request for the allowance of public funds to obtain a transcript of a pretrial mental evaluation hearing, where there was nothing in the record to indicate that the prosecution intended to call the psychiatrists or psychologists as witnesses, that the witnesses had any testimony favorable to the defense, or that the defendant intended to call them as hostile witnesses. Therefore, there was little reason for the trial court to consider the transcript of the prior proceeding to have any relevance at trial. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982).

A preliminary hearing transcript, when alleged to be necessary to the defense, must be included among the services and facilities provided by the state to indigents under this section. *State v. Kay*, 108 Idaho 661, 701 P.2d 281 (Ct. App. 1985).

Use of Public Funds.

Defendant in a murder prosecution was not denied his right to effective assistance of counsel by the court's refusal to allocate public funds for a community survey to determine whether defendant could obtain a fair and impartial trial in the county, since defendant had the opportunity to examine each juror upon voir dire as to bias and prejudice and the opportunity to present to the trial court all materials which he believed prejudicial. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

The psychiatric examinations available to a defendant under § 18-211 and subsection (a) of this section were sufficient to enable him to evaluate an asserted insanity defense, and were likewise sufficient to satisfy the constitutional demands of fundamental fairness. Accordingly, where, notwithstanding some apparent irregularities in preparing and filing the evaluation report, the defendant had already received an adequate examination at state expense, the trial court did not err in exercising its discretion to deny the defendant funds for an additional psychiatric examination. *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982). (decision prior to 1982 enactment of § 18-207).

19-853. Duty to notify accused or detained of right to counsel — Appointment of counsel. — (a) If a person who is being detained by a law enforcement officer, or who is confined or who is the subject of hospitalization proceedings pursuant to sections 66-322, 66-326, 66-329 or 66-409,

Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge or hearing, as the case may be, shall:

(1) clearly inform him of his right to counsel and of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the public defender or trial court concerned, as the case may be, that he is not so represented. As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer.

(b) Upon commencement of any later judicial proceeding relating to the same matter, including, but not limited to, preliminary hearing, arraignment, trial, any post-conviction proceeding, or post-commitment proceeding, the presiding officer shall clearly inform the person so detained or charged of his right to counsel and of the right of a needy person to be represented by an attorney at public expense. Provided, the appointment of an attorney at public expense in uniform post-conviction procedure act proceedings shall be in accordance with section 19-4904, Idaho Code.

(c) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender or assign an attorney, as the case may be.

(d) Upon notification by the court or assignment under this section, the public defender or assigned attorney, as the case may be, shall represent the person with respect to whom the notification or assignment is made. [1967, ch. 181, § 3, p. 599; 1968 (2nd E.S.), ch. 10, § 3, p. 20; am. 1981, ch. 114, § 4, p. 169; am. 1982, ch. 59, § 4, p. 91; am. 1984, ch. 229, § 1, p. 548; am. 2001, ch. 160, § 1, p. 568.]

Compiler's notes. Section 5 of S.L. 1981, ch. 114 is compiled as § 37-3105.

Section 5 of S.L. 1982, ch. 59 is compiled as § 56-201.

Section 42 of S.L. 1981, ch. 114 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

Cited in: Jones v. State, 93 Idaho 859, 477 P.2d 101 (1970); State v. Kasio, 106 Idaho 851, 683 P.2d 887 (Ct. App. 1984); Herrera v. Conner, 111 Idaho 1012, 729 P.2d 1075 (Ct. App. 1986); Rodriguez v. State, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, Follinus v. State, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

ANALYSIS

Blood alcohol concentration test.

Delayed notification.

Evidence taken in other jurisdiction.

In general.

Investigations.

Notice to defense counsel.

Preindictment lineup.

Preliminary hearing.

Right to counsel.

Waiver of rights.

Who entitled.

Blood Alcohol Concentration Test.

The purpose of the blood alcohol concentration test under the implied consent statute is to gain evidence of a person's blood alcohol level in order to determine whether he or she was driving under the influence; the procedure is investigatory in nature. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

There is no constitutional right to counsel prior to or at the time of the police's evidentiary BAC test. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

Delayed Notification.

An interval of 55 minutes between defendant's detention and the reading of his

Miranda rights was reasonable and in full compliance with this section; the defendant was pulled over, searched, handcuffed and transported directly to jail where he had a five-minute conversation with a deputy before being advised of his Miranda rights. *Fetterly v. Paskett*, 744 F. Supp. 966 (D. Idaho 1990).

Evidence Taken in Other Jurisdiction.

Idaho court properly refused to exclude from evidence a statement by defendant which was taken in another jurisdiction in compliance with the United States constitutional standards, but not in compliance with this section, since there was no rationale for application of the exclusionary rule in such situation. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

In General.

By the enactment of this section, the Idaho legislature has codified the requirements laid down by the United States Supreme Court in the *Miranda* decision; however, the legislature has gone beyond the United States constitutional requirements enunciated in *Miranda* and has required that a person accused or detained be given such *Miranda* warnings in writing and that the receipt of the warning should be acknowledged. *State v. Culbertson*, 105 Idaho 128, 666 P.2d 1139 (1983).

Investigations.

When defendant and 15 other prison inmates were placed in maximum security during the sheriff's investigation of the murder of a fellow inmate the matter was still in its investigatory stage and not its accusatory stage and thus defendant did not then acquire the right to have the public defender informed of his detention nor the right to have counsel represent him. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

Although this section refers to a detainee's right to counsel, this right attaches at the accusatory rather than an investigative stage of criminal proceedings. *McNeely v. State*, 119 Idaho 182, 804 P.2d 911 (Ct. App. 1990).

Notice to Defense Counsel.

This section does not require the police to notify the public defender's office prior to interrogating a suspect. *State v. Gord*, 118 Idaho 15, 794 P.2d 285 (Ct. App.), cert. denied, 118 Idaho 168, 795 P.2d 867 (1990).

Since defendant waived his *Miranda* rights, any duty imposed upon the police to contact the public defender pursuant to this section was suspended until such time as defendant invoked his right for counsel to be present during the custodial interrogation. *State v. Gord*, 118 Idaho 15, 794 P.2d 285 (Ct. App.),

cert. denied, 118 Idaho 168, 795 P.2d 867 (1990).

Preindictment Lineup.

Where defendant after being told about lineup requested to speak with an attorney whereupon the public defender was called and after detention order was read to the public defender he spoke to defendant telling him to cooperate in the lineup but not to answer any questions, it was more appropriate to apply a rule requiring the defendant to show that prejudice resulted from the alleged ineffectiveness of his counsel in not attending the lineup, rather than to apply a *per se* rule that prejudice must be presumed to exist when counsel fails to attend a preindictment lineup. *Boman v. State*, 129 Idaho 520, 927 P.2d 910 (Ct. App. 1996).

Preliminary Hearing.

The right to counsel embraces all critical stages of the criminal justice process after commencement of adversarial criminal proceedings against the accused; because the preliminary hearing is a critical stage, the absence of an attorney will be excused only where the accused knowingly and intelligently has waived his or her right to counsel. *State v. Wuthrich*, 112 Idaho 360, 732 P.2d 329 (Ct. App. 1986).

Right to Counsel.

Where a DUI defendant after submitting to a BAC test and being advised of his right to an independent test did not avail himself of this right, since there is not a constitutional right to counsel prior to or at the time of the police's evidentiary BAC test and since this section does not enlarge this constitutional right because the period of time at issue does not constitute a "critical stage" in a criminal proceeding, defendant's right to counsel was not violated inasmuch as he was advised of this right at his arraignment. *State v. Shelton*, 129 Idaho 877, 934 P.2d 943 (Ct. App. 1997).

Waiver of Rights.

The trial court's conclusions that defendant had made a knowing waiver of his rights and that his statements were admissible was supported by substantial evidence showing defendant was not a bright young man, but that he did have low-normal intelligence; that he was capable of comprehending what was going on about him; and that he could read and write and could understand instructions. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Where defendant was given the *Miranda* warnings in the course of an illegal, sham arrest for vagrancy, the purpose of which was to gain evidence against defendant for rob-

bery, defendant's waiver of the rights enunciated in *Miranda* was without effect. *State v. Barwick*, 94 Idaho 139, 483 P.2d 670 (1971).

A short lapse of time between a verbal reading of the *Miranda* rights and the accused's written execution of the *Miranda* waiver form is not such police behavior as to require the exclusion of relevant evidence as a disciplinary measure. *State v. McKinney*, 107

Idaho 180, 687 P.2d 570 (1984) (decision under this section prior to 1984 amendment).

Who Entitled.

The indigent youthful offender (and his parent) and the indigent adult offender are entitled to an order of the court providing legal representation. *James v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

19-854. Determination of need — Factors considered — Partial payment by accused — Reimbursement. — (a) The determination of whether a person covered by section 19-852, Idaho Code, is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under section 19-858, Idaho Code, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

(b) In determining whether a person is a needy person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

(c) To the extent that a person covered by section 19-852, Idaho Code, is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

(d) A needy person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services. The immediate inability of the needy person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement. [1967, ch. 181, § 4, p. 599; am. 2001, ch. 287, § 1, p. 1023.]

Compiler's notes. Section 2 of S.L. 2001, ch. 287 declared an emergency. Approved April 2, 2001.

Sec. to sec. ref. This section is referred to in § 19-858.

Rule to sec. ref. This section is referred to in I.C.R. 10.

Cited in: *Mahler v. Birnbaum*, 95 Idaho 14, 501 P.2d 282 (1972); *State v. Wilson*, 136 Idaho 771, 40 P.3d 129 (Ct. App. 2001); *State v. Suiter*, 138 Idaho 662, 67 P.3d 1274 (Ct. App. 2003).

ANALYSIS

Burden of showing need.
Furnishing information.
Inquiry into need.
Need not shown.
Reimbursement.

Burden of Showing Need.

The initial burden rests upon defendant to demonstrate to the court's satisfaction his inability to advance or secure costs to pay for transcript; once defendant makes such a showing, the state must come forward with substantial factual evidence of defendant's ability to pay, in whole or in part, the necessary costs. *State v. Randles*, 109 Idaho 933, 712 P.2d 634 (1985).

Once the court had found the defendant not indigent, the burden fell upon the defendant to apprise the court of any subsequent circumstances rendering him indigent. *State v. Hesse*, 110 Idaho 949, 719 P.2d 1209 (1986).

Furnishing Information.

A person cannot logically claim constitutional rights afforded to indigents and at the same time refuse to supply information necessary to establish his status as an indigent.

Quinlivan v. State, 94 Idaho 334, 487 P.2d 928 (1971).

Inquiry into Need.

Courts are required to conduct inquiries into a defendant's need for public defense and while release on bail does not necessarily prevent a defendant from qualifying for public defense, the court may nonetheless consider it as a factor in making a determination of need. *State v. Bowcutt*, 101 Idaho 761, 620 P.2d 795 (1980).

Need Not Shown.

The district court did not abuse its discretion in denying motion for county payment of

transcript costs on appeal, where defendants were purchasing property valued at \$10,600 and they owned two vehicles worth \$600. *State v. Randles*, 109 Idaho 933, 712 P.2d 634 (1985).

Reimbursement.

The district court erred by ordering defendant to reimburse the county public defender office for its services rendered, because Idaho law requires that a defendant presently have the means to pay for an attorney's services before a reimbursement award can be entered. *State v. Weaver*, 135 Idaho 5, 13 P.3d 5 (Ct. App. 2000).

19-855. Qualifications of counsel. — No person may be given the primary responsibility of representing a needy person unless he is licensed to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime. [1967, ch. 181, § 5, p. 599.]

19-856. Appointment of substitute attorney. — At any stage, including appeal or other post-conviction proceeding, the court concerned may for good cause assign a substitute attorney. The substitute attorney has the same functions with respect to the needy person as the attorney for whom he is substituted. If the substitute attorney is not in the office of the public defender the court shall prescribe reasonable compensation for him and approve the expenses necessarily incurred by him in the defense of the needy person. [1967, ch. 181, § 6, p. 599.]

ANALYSIS

Discretion as to stage of appointment.
Motion for substitution.
Right in Youth Rehabilitation Act cases.
Self-representation.
Substitution denied.
Who entitled.

Discretion as to Stage of Appointment.

At any stage in the proceeding, including appeal or other post-conviction proceedings, the court may, in its discretion, assign substitute counsel for good cause. *State v. Brown*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992).

Motion for Substitution.

Where the record was completely devoid of any hint of counsel's incompetence or his alleged inability to render effective assistance of counsel, the court was not required to conduct a detailed inquiry into the question of counsel's lack of "desire" to be competent or into the source of any attorney-client conflict; furthermore the trial judge should not be required to act as advocate for the defendant in a criminal proceeding, for his only obligation was to afford defendant a full and fair opportunity to present the facts and reasons

in support of his motion for substitution of counsel after having been made aware by the court of the problems involved. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

Right in Youth Rehabilitation Act Cases.

Youth Rehabilitation Act (formerly §§ 16-1801 — 16-1845, see now Juvenile Corrections Act, § 20-501 et seq.) proceedings are quasi-criminal in nature, and the right of the involved indigents to counsel cannot be seriously contested. *James v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

Self-Representation.

Although a defendant has the right to reject court appointed counsel and conduct his own defense, since such a decision amounts to a waiver of the right to counsel, the defendant should be made aware of the problems inherent in self-representation so that such waiver is knowingly and intelligently made. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

Substitution Denied.

Where a defendant requested appointment of a substitute attorney based on the fact that his appointed counsel had not secured the appointment of an investigator and had discussed the advisability of entering a guilty

plea, it was not error for the trial judge to refuse to appoint a substitute since the defendant had failed to provide counsel with any information or leads upon which an investigator could operate and since a review of the record indicated that after the investigation of the case which counsel undertook, he might have been derelict in failing to advise the defendant to plead guilty in hopes of entering

into a plea bargain. *State v. McCabe*, 101 Idaho 727, 620 P.2d 300 (1980).

Who Entitled.

The indigent youthful offender (and his parent) and the indigent adult offender are entitled to an order of the court providing legal representation. *James v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

19-857. Waiver of counsel — Consideration by court. — A person who has been appropriately informed of his right to counsel may waive in writing, or by other record, any right provided by this act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with the English language and the complexity of the crime involved. [1967, ch. 181, § 7, p. 599.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

Cited in: *State v. Buzo*, 121 Idaho 324, 824 P.2d 899 (Ct. App. 1991).

ANALYSIS

Appearing without attorney.

Construction.

Effectiveness of counsel.

Examination of defendant.

Failure to advise defendant of right to counsel.

Knowing and intelligent waiver.

Notice of consequences.

Appearing without Attorney.

Defendant did not waive his right to counsel merely by appearing at a hearing without an attorney. *State v. Lindsay*, 124 Idaho 825, 864 P.2d 663 (Ct. App. 1993).

Construction.

This section is procedural and not substantive law. The subject of the statute is how a trial court will consider and rule on the waiver of the right to counsel. The statute does not create, define, or regulate any primary rights. Therefore, I.C.R. 11(c) takes precedence over this section. *State v. Maxey*, 125 Idaho 505, 873 P.2d 150 (1994).

Effectiveness of Counsel.

Where the record was completely devoid of any hint of counsel's incompetence or his alleged inability to render effective assistance of counsel, the court was not required to conduct a detailed inquiry into the question of counsel's lack of "desire" to be competent or into the source of any attorney-client conflict;

furthermore the trial judge should not be required to act as advocate for the defendant in a criminal proceeding, for his only obligation was to afford defendant a full and fair opportunity to present the facts and reasons in support of his motion for substitution of counsel after having been made aware by the court of the problems involved. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

Examination of Defendant.

A trial court is required to address the defendant personally and determine on the record that the demand to waive counsel is competently and intelligently made with an understanding of the nature of the crime and punishment involved. *State v. Langley*, 109 Idaho 119, 705 P.2d 1074 (Ct. App. 1985), rev'd on other grounds, 110 Idaho 895, 719 P.2d 1155, cert. denied, 479 U.S. 861, 107 S. Ct. 210, 93 L. Ed. 2d 140 (1986).

A penetrating and comprehensive examination of all the circumstances involved in a waiver of counsel must be conducted by the trial judge. This examination should make the defendant aware of the problems inherent in self-representation so that a waiver of counsel is knowingly and intelligently made. *State v. Langley*, 109 Idaho 119, 705 P.2d 1074 (Ct. App. 1985), rev'd on other grounds, 110 Idaho 895, 719 P.2d 1155, cert. denied, 479 U.S. 861, 107 S. Ct. 210, 93 L. Ed. 2d 140 (1986).

Failure to Advise Defendant of Right to Counsel.

Although the district court failed to advise defendant at the time of his guilty plea that he had the right to court-appointed counsel to represent him, the error was harmless; there was nothing in the record that revealed any

defect in the taking of the plea and the court indicated, upon reconsideration of the sentence, that even if defendant had been represented by counsel, no different sentence would have been imposed. *State v. Smith*, 122 Idaho 164, 832 P.2d 337 (Ct. App. 1992).

Knowing and Intelligent Waiver.

Where defendant acted pro se at his trial and trial judge repeatedly and meticulously sought to dissuade defendant from his waiver of counsel, advised defendant of dangers of attempting to represent himself and his defense in a criminal trial, and attempted unsuccessfully to get defendant to allow counsel to sit with him and advise him during the course of the trial, the record clearly established a knowing and intelligent waiver of counsel. *State v. McCabe*, 101 Idaho 727, 620 P.2d 300 (1980).

In determining whether the waiver of right to counsel was intelligently given, the district court must consider the particular facts in each case, as well as the factors enumerated by this section concerning the background of the defendant, and make appropriate findings on the record. *State v. Langley*, 109 Idaho 119, 705 P.2d 1074 (Ct. App. 1985), rev'd on other

grounds, 110 Idaho 895, 719 P.2d 1155, cert. denied, 479 U.S. 861, 107 S. Ct. 210, 93 L. Ed. 2d 140 (1986).

The state presented sufficient evidence to demonstrate that a minor defendant knowingly, voluntarily and intelligently waived his right to counsel where although the defendant was not particularly sophisticated, the words contained in the written waiver form were simple enough that he could understand the content, and the defendant was only a few months away from his eighteenth birthday at the time of his waiver, and the crimes he committed were neither complex nor did they require a great deal of planning or intelligence to execute. *State v. Doe*, 131 Idaho 709, 963 P.2d 392 (Ct. App. 1998).

Notice of Consequences.

Although a defendant has the right to reject court appointed counsel and conduct his own defense, since such a decision amounts to a waiver of the right to counsel, the defendant should be made aware of the problems inherent in self-representation so that such waiver is knowingly and intelligently made. *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980).

19-858. Reimbursement to county — When authorized. — (a) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under this act:

- (1) to which he was not entitled;
- (2) with respect to which he was not a needy person when he received it; or
- (3) with respect to which he has failed to make the certification required by section 19-854; and for which he refuses to pay or reimburse. Suit must be brought within five (5) years after the date on which the aid was received.

(b) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person other than a person covered by subsection (a) above, who has received legal assistance under this act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it according to the standards of ability to pay applicable under sections 19-851, 19-852 and 19-854, but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received.

(c) Amounts recovered under this section shall be paid into the county general fund. [1967, ch. 181, § 8, p. 599.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

Sec. to sec. ref. This section is referred to in § 19-854.

Warning to Defendant of Possible Claim.

Trial court did not err in accurately informing defendant, who posted bond but did not retain private counsel, of the possibility of a later suit by the county for reimbursement for the cost of the services of the public defender.

State v. Bowcutt, 101 Idaho 761, 620 P.2d 795 (1980).

19-859. Public defender authorized — Court appointed attorneys — Joint county public defenders. — (a) The board of county commissioners of each county shall provide for the representation of needy persons who with respect to serious crimes are subject to proceedings in the county or are detained in the county by law enforcement officers. They shall provide this representation by:

- (1) establishing and maintaining an office of public defender;
- (2) arranging with the courts of criminal jurisdiction in the county to assign attorneys on an equitable basis through a systematic, coordinated plan; or
- (3) adopting a combination of these alternatives.

Until the board elects an alternative, it shall be considered as having elected alternative (a)(2).

(b) If it elects to establish and maintain an office of public defender, the board of county commissioners of a county may join with the board of county commissioners of one (1) or more other counties to establish and maintain a joint office of public defender. In that case, the participating counties shall be treated for the purposes of this act as if they were one (1) county.

(c) If the board of county commissioners of a county elects to arrange with the courts of criminal jurisdiction in the county to assign attorneys, a court of the county may provide for advance assignment of attorneys, subject to later approval by it, to facilitate representation of matters arising before appearance in court. [1967, ch. 181, § 9, p. 599.]

Compiler's notes. For words "this act" referred to in subsection (b), see compiler's notes, § 19-858.

Cited in: State v. Fisk, 92 Idaho 675, 448 P.2d 768 (1968).

Sec. to sec. ref. This section is referred to in § 19-862.

19-860. Public defender — Term — Compensation — Appointment — Qualifications — Court appointed attorneys — Compensation. — (a) If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender, the board shall:

- (1) Prescribe the qualifications of such public defender, his term of office (which may not be less than two (2) years), and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis. So far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law.
- (2) Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons (if that many are available) designated by a committee of lawyers appointed by the administrative judge of the judicial

district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, such public defender may engage in the practice of civil law and criminal law other than in the discharge of the duties of his office, unless he is prohibited from doing so by the board of county commissioners.

(b) If a court before whom a person appears upon a formal charge assigns an attorney other than a public defender to represent a needy person, the appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed. The attorney shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. [1967, ch. 181, § 10, p. 599; am. 1968 (2nd E. S.), ch. 23, § 1, p. 45; am. 1988, ch. 342, § 1, p. 1019; am. 1998, ch. 72, § 1, p. 266.]

Cited in: State v. Fisk, 92 Idaho 675, 448 P.2d 768 (1968).

Construction.

The field of operation of this act (S.L. 1997,

ch. 181) is coextensive with the scope of the general constitutional right to the assistance of counsel. State v. Reyna, 92 Idaho 669, 448 P.2d 762 (1968).

19-861. Public defender's office — Employees — Compensation — Facilities. — (a) If an office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the board of county commissioners, as many assistant public defenders, clerks, investigators, stenographers, and other persons as the board considers necessary for carrying out his responsibilities under this act. A person employed under this section serves at the pleasure of the public defender.

(b) If an office of public defender has been established, the board of county commissioners shall:

(1) provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in the jail) necessary for carrying out the public defender's responsibilities under this act; or

(2) grant the public defender an allowance in place of those facilities.

(c) A defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the county prosecutor. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county board of commissioners. [1967, ch. 181, § 11, p. 599.]

Sec. to sec. ref. This section is referred to in § 19-863.

Private Investigator.

In a murder prosecution it was not error for the court to refuse to allow the defendant the

services of a private investigator under subsection (c) of this section for the purpose of checking numerous witnesses where he was already allowed the services of two attorneys, who still had the bulk of their trial preparation ahead of them when the motion was

made, and where the motion merely stated in conclusory fashion that the number of witnesses involved precluded effective preparation of counsel. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Since the statute authorizes an attorney to use "the same state facilities for evaluation of evidence as are available to the county prosecutor" and the motion to inspect the premises and for production of documents in a burglary prosecution hardly had reference to

the use of state facilities for evaluating evidence, and did not make reference to the right of an accused to inspect all the "documents in the file of the case," there was no error on the part of the trial court in denying defendant's motion. *State v. Bailey*, 94 Idaho 285, 486 P.2d 998 (1971), overruled on other grounds, *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988).

Collateral References. Right of public defenders to join collective bargaining unit. 108 A.L.R.5th 241.

19-862. Appropriation for public defender — Private contributions. — (a) The board of county commissioners of each county shall annually appropriate enough money to administer the program of representation that it has elected under section 19-859.

(b) If the board of county commissioners of a county elects to establish and maintain an office of public defender, the county may accept private contributions toward the support of his office. [1967, ch. 181, § 12, p. 599.]

19-863. Defense expenses — Allocation in jointly established offices. — (a) Subject to section 19-861, any direct expense, including the cost of a transcript that is necessarily incurred in representing a needy person under this act, is a county charge against the county on behalf of which the service is performed.

(b) If 2 or more counties jointly establish an office of public defender, the expenses not otherwise allocable among the participating counties under subsection (a) shall be allocated, unless the counties otherwise agree, on the basis of population according to the most recent decennial census. [1967, ch. 181, § 13, p. 599.]

19-863A. Capital crimes defense fund authorized. — (1) The establishment of a capital crimes defense fund by the counties of the state for purposes of funding the costs of criminal defense in cases where the penalty of death is a legal possibility is hereby authorized. The fund shall be organized and operated in accordance with a joint powers agreement, as authorized by chapter 23, title 67, Idaho Code, executed by the participating counties. Membership in the fund shall be voluntary, as determined by resolution of the board of county commissioners of the respective counties of the state.

(2) The fund may be comprised of contributions from participating counties and any court fees or other funds designated or appropriated for deposit in the fund by the legislature.

(3) The fund shall be operated and administered by a board of representatives to be selected as provided in the joint powers agreement. If moneys are appropriated to the fund by the legislature, the governor shall appoint a representative of the executive branch of state government to serve as a voting member of the governing board, and if court fees are designated for deposit in the fund, the Idaho supreme court shall appoint a representative of the judicial branch of state government to serve as a voting member of the board.

(4) The governing board of the fund shall have full authority to employ personnel and contract for personal and professional services as necessary and may take all other steps necessary or proper to determine the manner in which the fund shall be utilized to assist participating counties in meeting defense costs associated with representation of indigent defendants charged with crimes for which the penalty of death is a legal possibility.

(5) The services of the state appellate public defender as provided in section 19-870, Idaho Code, shall be available only to those counties participating in the fund. [I.C., § 19-863A, as added by 1998, ch. 389, § 1, p. 1190.]

Compiler's notes. Section 2 of S.L. 1998, ch. 389 is compiled as § 19-867.

Sec. to sec. ref. This section is referred to in § 19-870.

19-864. Records of defense attorney — Annual report of public defender's office. — (a) A defending attorney shall keep appropriate records respecting each needy person whom he represents under this act.

(b) The public defender in those counties electing to establish and maintain such an office, shall submit an annual report to the board of county commissioners showing the number of persons represented under this act, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed by this act. A copy of the report shall also be submitted to each court having criminal jurisdiction in the counties that the program serves. [1967, ch. 181, § 14, p. 599.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-

851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

19-865. Application of act — State courts — Federal courts. — This act applies only to representation in the courts of this state, except that it does not prohibit a public defender from representing a needy person in a federal court of the United States, if:

(a) The matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

(b) Representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the board of county commissioners. [1967, ch. 181, § 15, p. 599.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

Section 16 of S.L. 1967, ch. 181 reads: "If a provision, or an application of a provision, of

this act is held invalid, the valid provisions and applications that can be given effect without the invalid provision or application are intended to be in effect. To this end, the provisions of this act are severable."

19-866. Provisions not exclusive. — The protections provided by this act do not exclude any protection or sanction that the law otherwise provides. [1967, ch. 181, § 17, p. 599.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 181, compiled as §§ 19-

851 — 19-863, 19-864 — 19-866 and amendatory of § 19-1512.

19-867. Short title. — Sections 19-867 through 19-872, Idaho Code, shall be known as the “State Appellate Public Defender Act.” [I.C., § 19-867, as added by 1998, ch. 389, § 2, p. 1190.]

Compiler’s notes. Section 1 of S.L. 1998, ch. 389 is compiled as § 19-863A. **Sec. to sec. ref.** Sections 19-867 through 19-872 are referred to in § 19-867.

19-868. Statement of legislative intent. — The legislature recognizes that the cost of legal representation of indigent defendants upon the appeal of their criminal convictions, particularly convictions for first-degree murder, is an extraordinary burden on the counties of this state. In order to reduce this burden, provide competent counsel but avoid paying high hourly rates to independent counsel to represent indigent defendants in appellate proceedings, the legislature hereby creates the office of the state appellate public defender. [I.C., § 19-868, as added by 1998, ch. 389, § 3, p. 1190.]

Sec. to sec. ref. Sections 19-867 through 19-872 are referred to in § 19-867.

19-869. Creation — Appointment — Qualifications — Term — Compensation. — (1) The office of state appellate public defender is hereby created in the department of self-governing agencies.

(2) The state appellate public defender shall be appointed by the governor, with the advice and consent of the senate, from a list of not less than two (2) nor more than four (4) qualified persons recommended by a committee consisting of the president of the Idaho state bar association, the chairman of the senate judiciary and rules committee and the chairman of the house judiciary, rules and administration committee and a citizen at large appointed by the governor. The chief justice of the Idaho supreme court, or her designee, shall be an ex officio member of the committee.

(3) The state appellate public defender shall be an attorney licensed to practice law in the state of Idaho and shall have a minimum of five (5) years’ experience as a practicing attorney. The governor may prescribe such further qualifications as he deems necessary for the position.

(4) The state appellate public defender shall serve for a term of four (4) years, during which term he may be removed only for good cause, and shall be compensated in an amount determined by the governor.

(5) The state appellate public defender may adopt policies or rules necessary to give effect to the purposes of this act. [I.C., § 19-869, as added by 1998, ch. 389, § 4, p. 1190.]

Sec. to sec. ref. Sections 19-867 through 19-872 are referred to in § 19-867.

19-870. Powers and duties. — (1) Subject to the provisions of subsection (2) of this section, the state appellate public defender, upon appointment by the court, shall provide representation for indigent defendants in felony criminal actions in the following cases:

(a) Appeals from convictions in district court, where the appellant was convicted on or after September 1, 1998;

(b) Appeals from the district court in post-conviction relief proceedings brought pursuant to the uniform post-conviction procedure act, chapter 49, title 19, Idaho Code, where the denial of the post-conviction relief occurred on or after September 1, 1998;

(c) Appeals from the district court in habeas corpus proceedings brought pursuant to chapter 42, title 19, Idaho Code, where the petition was denied on or after September 1, 1998;

(d) Post-conviction relief proceedings in district court in capital cases where the appellant was sentenced on or after September 1, 1998, or where the court has appointed the state appellate public defender or the state appellate public defender has accepted the request by the court for representation in the case and such event occurred on or after July 1, 1998, but before March 1, 1999.

(2) The services of the state appellate public defender shall be available only to those counties participating in the capital crimes defense fund established pursuant to section 19-863A, Idaho Code.

(3) The state appellate public defender may employ deputy state appellate public defenders and other employees necessary to carry out the responsibilities of the office. The state appellate public defender, in his discretion, may contract with private attorneys to provide representation on a case-by-case basis when such contracts would conserve budgetary resources.

(a) A deputy state appellate public defender must be licensed to practice law in the state of Idaho and possess any other qualifications required by the state appellate public defender.

(b) The state appellate public defender shall fix the compensation of all employees of the office and they shall serve at his pleasure.

(c) The state appellate public defender, deputy state appellate public defenders and all employees of the office of the state appellate public defender shall be nonclassified employees, pursuant to section 67-5303, Idaho Code.

(4) The state appellate public defender shall have any and all other powers and duties necessary to carry out the purposes of this act, including the authority to promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code. [I.C., § 19-870, as added by 1998, ch. 389, § 5, p. 1190; am. 1999, ch. 157, § 1, p. 435.]

Compiler's notes. Section 2 of S.L. 1999, ch. 157 declared an emergency retroactively to July 1, 1998 approved March 23, 1999.

Sections 19-867 through 19-872 are referred to in § 19-867.

Sec. to sec. ref. This section is referred to in § 19-863A.

19-871. Appointment of additional counsel. — Should the state appellate public defender be unable to carry out the duties required in this act because of a conflict of interest or any other reason, the state appellate public defender shall arrange for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender. [I.C., § 19-871, as added by 1998, ch. 389, § 6, p. 1190.]

Sec. to sec. ref. Sections 19-867 through 19-872 are referred to in § 19-867.

19-872. Annual report. — The state appellate public defender shall make an annual report to the state board of examiners, the supreme court, the legislature and all counties for whom the office has provided services concerning the cases handled by his office during the preceding year. [I.C., § 19-872, as added by 1998, ch. 389, § 7, p. 1190.]

Compiler's notes. Section 8 of S.L. 1998, ch. 389 is compiled as § 67-5303.

Sec. to sec. ref. Sections 19-867 through 19-872 are referred to in § 19-867.

CHAPTER 9

MODE OF PROSECUTION OF PUBLIC OFFENSES

SECTION.

19-901. Indictment or information.

19-902. Mode of prosecution for removal of officers.

SECTION.

19-903. Indictments and accusations —
Where found.

19-901. Indictment or information. — All public offenses triable in the district court must be prosecuted by indictment, or information, except as provided in the next section. [Cr. Prac. 1864, § 173; R.S., § 7600; am. R.C. & C.L., § 7600; C.S., § 8768; I.C.A., § 19-801.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Grand jury drawn only by direction of judge, § 19-1307.

Indictment and information, I.C.R. 7.

Prosecutions only by indictment or information, Const., art. 1, § 8.

Cited in: Fox v. Flynn, 27 Idaho 721, 150 P. 44 (1915); In re Winn, 28 Idaho 461, 154 P.

497 (1916); Kline v. Shoup, 38 Idaho 202, 226 P. 729 (1923).

Misdemeanors.

Prosecution of misdemeanors triable in probate and justice's court may be commenced in district court by filing criminal complaint. State v. Snook, 34 Idaho 403, 201 P. 494 (1921); State v. Moodie, 35 Idaho 574, 207 P. 1073 (1922).

Collateral References. 41 Am. Jur. 2d, Indictments and Informations, § 1 et seq.

42 C.J.S., Indictments and Informations, § 1 et seq.

19-902. Mode of prosecution for removal of officers. — When the proceedings are had for the removal of district, county, municipal or precinct officers they may be commenced by an accusation or information, in writing, as provided in chapter 41 of this title. [Cr. Prac. 1864, § 174; R.S., R.C., & C.L., § 7601; C.S., § 8769; I.C.A., § 19-802.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: Kline v. Shoup, 38 Idaho 202, 226 P. 729 (1923); Pittam v. Maynard, 103 Idaho 177, 646 P.2d 419 (1982).

19-903. Indictments and accusations — Where found. — All accusations against district, county, municipal and precinct officers, and all

indictments, must be found in the district court. [Cr. Prac. 1864, § 175; R.S., R.C., & C.L., § 7602; C.S., § 8770; I.C.A., § 19-803.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Calkins, 63 Idaho 314, 120 P.2d 253 (1941).

CHAPTER 10

FORMATION OF GRAND JURY

SECTION.

- 19-1001. Challenge — By whom made.
- 19-1002. Grounds for challenge to panel.
- 19-1003. Grounds for challenge to individual jurors.
- 19-1004. Form of challenge.
- 19-1005. Decision upon challenge.
- 19-1006. Challenge to panel — Effect of allowance.
- 19-1007. Challenge to individual — Effect of allowance.
- 19-1008. Manner of filling panel after sustaining challenge.

SECTION.

- 19-1009. Objections must be by challenge.
- 19-1010. Appointment of foreman.
- 19-1011. Oath of foreman.
- 19-1012. Oath of jurors.
- 19-1013. Charge to jury.
- 19-1014. Retirement and discharge of jury.
- 19-1015. Special grand jury.
- 19-1016. Special grand jury — Contents and delivery of order.
- 19-1017. Special grand jury — Execution and return of order.
- 19-1018. Drawing of special jury.

19-1001. Challenge — By whom made. — The people, or a person held to answer a charge for a public offense, may challenge the panel of a grand jury, or an individual juror. [Cr. Prac. 1864, § 177; R.S., R.C., & C.L., § 7607; C.S., § 8771; I.C.A., § 19-901.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Constitution of grand jury, § 2-502.

Grand jury, I.C.R. 6.1 to 6.9.

Grand jury defined, § 2-103.

Sec. to sec. ref. This section is referred to in § 19-1004.

Effect on Indictment.

A motion to set aside indictment, made at time of arraignment, may be made for any cause that would have been grounds for challenge of panel or individual grand juror. State v. Roberts, 33 Idaho 30, 188 P. 895 (1920).

Collateral References. 38 Am. Jur. 2d, Grand Jury, § 1 et seq.

38A C.J.S., Grand Juries, § 1 et seq.

Exclusion of women as violation of constitutional rights of accused or as ground for reversal of conviction. 9 A.L.R. 661.

Validity of governmental requirement of oath of allegiance or loyalty as applied to

jurors. 18 A.L.R. 294; 28 A.L.R. 1345; 35 A.L.R. 1414; 45 A.L.R. 1234; 59 A.L.R. 735; 82 A.L.R. 709; 90 A.L.R. 119.

Exclusion from grand jury list of eligible class or classes of persons, effect of, and remedies for. 52 A.L.R. 919.

Women's suffrage amendment as affecting right of women to serve on grand jury. 71 A.L.R. 1338.

Prejudice of member of grand jury against defendant as ground of attack on indictment. 88 A.L.R. 899.

Eligibility of women as jurors. 157 A.L.R. 461.

Right to challenge personnel of grand jury. 169 A.L.R. 1169.

Exclusion of attorneys from grand jury list in criminal cases. 32 A.L.R.2d 890.

Jurisdiction or power of grand jury after expiration of term of court for which organized. 75 A.L.R.2d 544.

Accused's right to inspection of minutes of state grand jury. 20 A.L.R.3d 7.

Admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction. 37 A.L.R.3d 612.

Power of court to control evidence or wit-

nesses going before grand jury. 52 A.L.R.3d 1316.

Refusal to answer questions before state grand jury as direct contempt of court. 69 A.L.R.3d 501.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof. 78 A.L.R.3d 1147.

19-1002. Grounds for challenge to panel. — A challenge to the panel may be interposed for one or more of the following causes only:

1. That the requisite number of ballots was not drawn from the jury box of the county.

2. That notice of the drawing of the grand jury was not given.

3. That the drawing was not had in the presence of the officers designated by law. [Cr. Prac. 1864, § 178; R.S., R.C., & C.L., § 7608; C.S., § 8772; I.C.A., § 19-902.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Juries, I.R.C.P., Rule 47(a), 47(b), 47(d) — 47(p); I.C.A.R., Rules 61 — 64.

Sec. to sec. ref. This section is referred to in § 19-1004.

Effect on Indictment.

As a rule a challenge must be interposed before an indictment is found, however, accused may also move to quash indictment at time of arraignment. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

19-1003. Grounds for challenge to individual jurors. — A challenge to an individual grand juror may be interposed for one or more of the following causes:

1. That he is a minor.

2. That he is an alien.

3. That he is insane.

4. That he is a prosecutor upon a charge against the defendant.

5. That he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such.

6. That he has formed or expressed an unqualified opinion or belief that the defendant is guilty or not guilty of the offense charged; but a hypothetical opinion, founded on hearsay or information supposed to be true, unaccompanied with malice or ill will, shall not disqualify a grand juror or be a cause of challenge.

7. That a state of mind exists on his part in reference to the case, or to either party, which satisfies the court that he cannot act impartially and without prejudice to the substantial rights of the party challenging. [Cr. Prac. 1864, § 179; R.S., R.C., & C.L., § 7609; C.S., § 8773; I.C.A., § 19-903.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Hardy*, 4 Idaho 478, 42 P. 507 (1895).

ANALYSIS

Juror.

— Relationship with prosecutor.
Power of court.
Similar names.

Juror.

— Relationship with Prosecutor.

In denying the defendant's motion to dis-

miss grand jury indictment and subsequent conviction based upon contact between one of the grand jurors and the prosecuting attorney, the court ruled that use of first names by people in a small town did not characterize them as having a relationship and found credible the deputy prosecuting attorney's characterization of his relationship with the juror as a professional and casual one, and under the totality of the circumstances, these contacts did not make the juror an improper juror, nor was the formation of the grand jury improper either procedurally or substantively. *State v. Bujanda-Velazquez*, 129 Idaho 726, 932 P.2d 354 (1997).

Power of Court.

Court may, of own motion, excuse a juror deemed to be disqualified or incompetent. He

must insure the selection of qualified and impartial grand jurors. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Defendant was not prejudiced where judge dismissed three members of grand jury, one because of illness and two because of necessity of private employment, and appointed three new members. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Similar Names.

Challenge should be sustained where another man of similar name was impaneled in place of one drawn and not summoned. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

Collateral References. Women as grand jurors. 157 A.L.R. 461.

Police officers or other law enforcement officers as grand jurors. 72 A.L.R.3d 895, 958.

19-1004. Form of challenge. — The challenges mentioned in the last three sections may be oral, or in writing, and must be tried by the court. [Cr. Prac. 1864, § 180; R.S., R.C., & C.L., § 7610; C.S., § 8774; I.C.A., § 19-904.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Effect on Indictment.

A motion to set aside indictment may be made at time of arraignment upon any grounds for challenge of panel or individual grand juror. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

19-1005. Decision upon challenge. — The court must allow or disallow the challenge, and the clerk must enter its decisions upon the minutes. [Cr. Prac. 1864, § 181; R.S., R.C., & C.L., § 7611; C.S., § 8775; I.C.A., § 19-905.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1006. Challenge to panel — Effect of allowance. — If a challenge to the panel is allowed the grand jury are prohibited from inquiring into the charge against the defendant, by whom the challenge was interposed. If, notwithstanding, they do so, and find an indictment against him, the court must direct it to be set aside. [Cr. Prac. 1864, § 182; R.S., R.C., & C.L., § 7612; C.S., § 8776; I.C.A., § 19-906.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1007. Challenge to individual — Effect of allowance. — If a challenge to an individual grand juror is allowed he can not be present or

take part in the consideration of the charge as to which he was challenged against the defendant who interposed the challenge, or the deliberations of the grand jury thereon. The grand jury must inform the court of a violation of this section, and it is punishable by the court as a contempt. [Cr. Prac. 1864, §§ 183, 184; R.S., R.C., & C.L., § 7613; C.S., § 8777; I.C.A., § 19-907.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Participation in considering a charge after challenge sustained a misdemeanor, § 18-4401.

Unauthorized Presence of Juror.

When grand juror is disqualified he should not be present or take any part in consideration of the charge as to which he is disqualified, but he still remains a member of grand jury. If he takes part in such deliberations, notwithstanding injunction of court, he should be punished for contempt, but it is not ground for setting aside indictment. *Territory v. Staples*, 3 Idaho 35, 26 P. 166 (1891).

19-1008. Manner of filling panel after sustaining challenge. — If more than three challenges to individual grand jurors are allowed to the same defendant in reference to the same charge, the court must fill the panel to sixteen as to that charge by causing a sufficient number of competent jurors from those summoned and not before called, or if a sufficient number are not in attendance, then from the bystanders or from the body of the county to be sworn to act as jurors with the regular panel, upon the examination of that charge; and, if necessary to secure the full number of sixteen competent jurors, the court may require the sheriff to summon the required number. [R.S., R.C., & C.L., § 7614; C.S., § 8778; I.C.A., § 19-908.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Number of Jurors.

It appears from this section that under certain circumstances grand jury may sit with less than sixteen members and return valid indictment. *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

19-1009. Objections must be by challenge. — A person held to answer to a charge for a public offense can take advantage of any objection to the panel or to any individual grand juror in no other mode than by challenge. [Cr. Prac. 1864, § 185; R.S., R.C., & C.L., § 7615; C.S., § 8779; I.C.A., § 19-909.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1010. Appointment of foreman. — From the persons summoned to serve as grand jurors and appearing, the court must appoint a foreman. The court must also appoint a foreman when the person already appointed is excused or discharged before the grand jury is dismissed. [Cr. Prac. 1864, § 186; R.S., R.C., & C.L., § 7616; C.S., § 8780; I.C.A., § 19-910.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1011. Oath of foreman. — The following oath must be administered to the foreman of the grand jury:

You, as foreman of the grand jury, will diligently inquire into and true presentment make, of all public offenses against the state of Idaho, committed or triable within this county, of which you shall have or can obtain legal evidence. You will keep your own counsel, and that of your fellows, and of the government, and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said nor the manner in which you or any other grand juror may have voted in any matter before you. You will present no person through malice, hatred, or ill will, nor leave any unrepresented through fear, favor or affection, or for any reward or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, so help you God. [Cr. Prac. 1864, § 187; R.S., R.C., & C.L., § 7617; C.S., § 8781; I.C.A., § 19-911.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1012. Oath of jurors. — The following oath must be immediately thereupon administered to the other grand jurors present:

The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part, so help you God. [Cr. Prac. 1864, § 188; R.S., R.C., & C.L., § 7618; C.S., § 8782; I.C.A., § 19-912.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Collateral References. Officer, member of grand jury as, within constitutional or statutory provision in relation to oath or affirmation. 118 A.L.R. 1098.

19-1013. Charge to jury. — The grand jury being impaneled and sworn, must be charged by the court. In doing so, the court must give them such information as it may deem proper, or as is required by law, as to their duties, and as to any charges for public offenses returned to the court or likely to come before the grand jury. [Cr. Prac. 1864, § 189; R.S., R.C., & C.L., § 7619; C.S., § 8783; I.C.A., § 19-913.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1014. Retirement and discharge of jury. — The grand jury must then retire to a private room and inquire into the offenses cognizable by them. On the completion of the business before them, they must be discharged by the final adjournment of the court. [Cr. Prac. 1864, §§ 190, 191; R.S., R.C., & C.L., § 7620; C.S., § 8784; I.C.A., § 19-914.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

New juror.

Presence of judge.

New Juror.

Introduction of new juror, after indictment

but before its return to court, was not prejudicial to any right of the defendant. *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

Presence of Judge.

Indictment was not invalid on ground that grand jury was in session while district judge was holding court in another county. *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

Collateral References. Matters within investigating powers of grand jury. 22 A.L.R. 1356; 106 A.L.R. 1383; 120 A.L.R. 437.

19-1015. Special grand jury. — If an offense is committed during the sitting of the court, after the discharge of the grand jury, the court may, in its discretion, direct an order to be entered that the sheriff summon another grand jury. [Cr. Prac. 1864, § 192; R.S., R.C., & C.L., § 7621; C.S., § 8785; I.C.A., § 19-915.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1016. Special grand jury — Contents and delivery of order. — The order must require the sheriff to summon twenty persons, qualified to serve as grand jurors, to appear at a time specified, and a copy thereof, under the seal of the court, must, by the clerk be delivered to the sheriff. [Cr. Prac. 1864, § 193; R.S., R.C., & C.L., § 7622; C.S., § 8786; I.C.A., § 19-916.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1017. Special grand jury — Execution and return of order. — The sheriff must execute the order and return it, with a list of names of the persons summoned. [Cr. Prac. 1864, § 194; R.S., R.C., & C.L., § 7623; C.S., § 8787; I.C.A., § 19-917.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1018. Drawing of special jury. — At the time appointed the list must be called over, and the names of those in attendance be written by the clerk on separate ballots and put into a box, from which a grand jury must be drawn. [Cr. Prac. 1864, § 195; R.S., R.C., & C.L., § 7624; C.S., § 8788; I.C.A., § 19-918.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 11

POWERS AND DUTIES OF GRAND JURY

SECTION.

- 19-1101. Powers and duties in general.
- 19-1102. Presentment defined.
- 19-1103. Indictment defined.
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- 19-1105. Evidence receivable by grand jury.
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SECTION.

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- 19-1122. Self-incrimination — Refusal to testify or give evidence — Procedure.
- 19-1123. Secrecy enjoined — Exceptions — Use and availability of evidence.

19-1101. Powers and duties in general. — The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court, either by presentment or by indictment. [Cr. Prac. 1864, § 201; R.S., R.C., & C.L., § 7630; C.S., § 8789; I.C.A., § 19-1001.]

Cross ref. Grand jury, I.C.R. 6.1 to 6.9.

Sec. to sec. ref. This chapter is referred to in § 19-1601.

ANALYSIS

Indictments and informations.
Jurisdiction of court.

Indictments and Informations.

Informations are of equal dignity with indictments, subject only to the limitation of Const., art. 1, § 8, that information may be filed only after commitment by magistrate and that no information may be filed after charge has been ignored by grand jury. In re Winn, 28 Idaho 461, 154 P. 497 (1916).

Grand jury may present or indict without preliminary hearing, arrest or commitment of accused. State v. Taylor, 59 Idaho 724, 87 P.2d 454 (1939).

Since nothing in the constitution prohibits the use of information procedure as opposed to the indictment by a grand jury while a grand jury is in session, appellant's contention that while a grand jury was in session no prosecutions for felony could be instituted except by first submitting them to the grand jury for action was without merit. State v. Bailey, 94 Idaho 285, 486 P.2d 998 (1971), overruled on other grounds, State v. Flint, 114 Idaho 806, 761 P.2d 1158 (1988).

Jurisdiction of Court.

After preliminary examination and filing of an information, court acquires jurisdiction of defendant and of offense with which he is charged, from which it cannot be deprived by any action of grand jury convened at subsequent term. *In re Winn*, 28 Idaho 461, 154 P. 497 (1916).

Collateral References. 38 Am. Jur. 2d, Grand Jury, § 1 et seq.

38A C.J.S., Grand Juries, § 1 et seq.

Failure of witness to attend or obstruction of operation of grand jury. 8 A.L.R. 1579.

Matters within investing powers of grand jury. 22 A.L.R. 1356; 106 A.L.R. 1383; 120 A.L.R. 437.

Responsibility for defamation of character. 22 A.L.R. 1367.

Ultior purpose. 106 A.L.R. 1383; 120 A.L.R. 437.

Matters within investing powers of grand jury. 120 A.L.R. 437.

Contemporaneous existence or functioning of two or more grand juries. 121 A.L.R. 814.

Misconduct by jurors as contempt. 125 A.L.R. 1274.

Right of witness to claim privilege on subsequent criminal trial after testifying to same matter before grand jury. 36 A.L.R.2d 1403.

Privilege against self-incrimination as to testimony before grand jury. 38 A.L.R.2d 225.

Jurisdiction or power of grand jury after expiration of term of court for which organized. 75 A.L.R.2d 544.

Amendment of indictment or information with respect to name or capacity of person alleged to have been victim of crime as ground for continuance. 85 A.L.R.2d 1204.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations

as to place. 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 A.L.R.3d 1358.

Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 A.L.R.3d 968.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 A.L.R.3d 1357.

Power of court to make or permit amendment of indictment with respect to allegations as to money. 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment. 17 A.L.R.3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances. 17 A.L.R.3d 1285.

Accused's right to inspection of minutes of state grand jury. 20 A.L.R.3d 7.

Validity of indictment where grand jury heard incompetent witness. 39 A.L.R.3d 1064.

Power of court to control evidence or witnesses going before grand jury. 52 A.L.R.3d 1316.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct. 63 A.L.R.3d 586.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

Individual's right to present complaint or evidence of criminal offense to grand jury. 24 A.L.R.4th 316.

19-1102. Presentment defined. — A presentment is a formal statement in writing, by the grand jury, representing to the court that a public offense has been committed which is triable in the county, and that there is reasonable ground for believing that a particular individual named or described therein has committed it. [Cr. Prac. 1864, § 203; R.S., R.C., & C.L., § 7631; C.S., § 8790; I.C.A., § 19-1002.]

Cited in: *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970).

19-1103. Indictment defined. — An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense. [Cr. Prac. 1864, § 202; R.S., R.C., & C.L., § 7632; C.S., § 8791; I.C.A., § 19-1003.]

Cited in: Territory v. Evans, 2 Idaho (Hasb.) 425, 17 P. 139 (1888); State v. Bilboa, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923); State v. Jackson, 96 Idaho 584, 532 P.2d 926 (1975).

19-1104. Foreman may administer oaths. — The foreman may administer an oath to any witness appearing before the grand jury. [Cr. Prac. 1864, § 204; R.S., R.C., & C.L., § 7633; C.S., § 8792; I.C.A., § 19-1004.]

Cross ref. Form of oath, § 9-1402.

19-1105. Evidence receivable by grand jury. — In the investigation of a charge for the purpose of either presentment or indictment, the grand jury can receive any evidence that is given by witnesses produced and sworn before them except as hereinafter provided, furnished by legal documentary evidence, the deposition of a witness in the cases provided by this code or legally admissible hearsay. No witness whose testimony has been taken and reduced to writing on a preliminary examination must be subpoenaed or required to appear before the grand jury, until such testimony has been first submitted to and considered by the grand jury, but if such testimony has been lost or cannot be found, or if the grand jury after considering the same still desires the presence of any such witnesses, they may be subpoenaed. [Cr. Prac. 1864, §§ 205, 206; R.S., R.C., & C.L., § 7634; C.S., § 8793; I.C.A., § 19-1005; am. 1989, ch. 49, § 1, p. 62.]

Cross ref. Legal evidence, §§ 9-101 — 9-508.

ANALYSIS

Hearsay evidence.
Record on appeal.

Hearsay Evidence.

Where legally sufficient evidence will sustain an indictment, improperly admitted hearsay evidence will not overturn the indictment. State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).

Record on Appeal.

In the absence of a record on appeal setting

out what evidence was before the grand jury which returned the indictment charging the defendant with the crime of burglary, the reviewing court will not speculate that the proceedings of the grand jury were based solely upon hearsay merely because the endorsement on the indictment contained the name of only one witness who was not a witness to the crime. State v. Bullis, 93 Idaho 749, 472 P.2d 315 (1970).

Collateral References. Illegally produced evidence. 24 A.L.R. 1432.

19-1106. Evidence for defendant. — The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may require the prosecuting attorney to issue process for the witnesses. [Cr. Prac. 1864, § 207; R.S., R.C., & C.L., § 7635; C.S., § 8794; I.C.A., § 19-1006.]

Collateral References. Contempt, power of grand jury to punish for. 8 A.L.R. 1579; 54 A.L.R. 327.

19-1107. Sufficiency of evidence to warrant indictment. — The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury. [Cr. Prac. 1864, § 208; R.S., R.C., & C.L., § 7636; C.S., § 8795; I.C.A., § 19-1007.]

ANALYSIS

Degree of proof.
Dismissal of indictment.

Degree of Proof.

No objection could be made to charge to grand jury as to degree of proof necessary to justify an indictment where charge given was more favorable than that required by the statute. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Dismissal of Indictment.

An attorney's unsworn oral misstatement

to police officers regarding the whereabouts of a safe belonging to the attorney's client, whom the police were investigating for money laundering, did not constitute obstructing or delaying an officer within the meaning of § 18-705; consequently, the Court of Appeals, applying the standard of free review, dismissed the indictment. *State v. Brandstetter*, 127 Idaho 885, 908 P.2d 578 (Ct. App. 1995).

Collateral References. Indictment based on evidence illegally procured. 24 A.L.R. 1432.

Grand jury's failure or refusal to find indictment upon investigation as affecting right to file information. 120 A.L.R. 713.

19-1108. Duty of juror having knowledge of offense. — If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who must thereupon investigate the same. [Cr. Prac. 1864, § 209; R.S., R.C., & C.L., § 7637; C.S., § 8796; I.C.A., § 19-1008.]

19-1109. Matters of inquiry. [Repealed.]

Compiler's notes. This section, which comprised Cr. Prac. 1864, § 210; R.S., R.C., & C.L., § 7638; C.S., § 8797; I.C.A., § 19-1009, was repealed by S.L. 1981, ch. 124, § 1.

19-1110. Access to prisons and public records. — They are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county. [Cr. Prac. 1864, § 211; R.S., R.C., & C.L., § 7639; C.S., § 8798; I.C.A., § 19-1010.]

Cross ref. County treasurer's books, accounts and vouchers open to inspection by grand jury, § 31-2122.

19-1111. Who may be present at sessions of jury. — The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or of the prosecuting attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The prosecuting attorney of the county may at all times appear before the grand jury for the purpose of giving them information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he think it necessary, but no other person is permitted to be present during the sessions of the grand jury, except the members and witnesses actually under examination, and an interpreter, when necessary,

and no person must be permitted to be present during the expressions of their opinions, or giving their votes upon any matter before them. [Cr. Prac. 1864, § 212; R.S., R.C., & C.L., § 7640; C.S., § 8799; I.C.A., § 19-1011.]

Cross ref. Prosecuting attorney to attend grand jury when so requested, § 31-2604.

ANALYSIS

Judge.

Members of panel.

Prosecuting attorneys.

Purpose.

Stenographer.

Unauthorized personnel.

Judge.

Judge has no right to be present at session of grand jury unless requested, and neither he nor court can exercise any control over their deliberations. *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

Members of Panel.

Latter clause of this section, which prescribes who may be present at sessions of grand jury, means that no persons except members of grand jury, witnesses, etc., may be present and does not refer to members of panel although they are witnesses. *Territory v. Staples*, 3 Idaho 35, 26 P. 166 (1891).

Grand juror who has been successfully challenged should not be present during consideration of charges, however, his presence renders him liable for contempt of court but does not invalidate indictment. *Territory v. Staples*, 3 Idaho 35, 26 P. 166 (1891).

Introduction of new grand juror after indictment but before its return to the court, does not prejudice any substantial right of accused. *Rich v. Varian*, 36 Idaho 355, 210 P. 1011 (1922).

Prosecuting Attorneys.

The words "prosecuting attorney," as used in this section, are to be construed generally as including any attorney on the side of the prosecution not otherwise disqualified, upholding right of attorney general to appear before grand jury. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

Grand jury proceeding was not invalid on the ground that deputy prosecuting attorney appeared at sessions without having a finding made by county commissioners that his appointment was necessary where he was duly appointed by prosecutor, oath taken, bond filed and approved by county commissioners since it could be presumed that his appointment was necessary as commissioners had

approved appointment and bond. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Subsequent to the presentation of defendant's case to the grand jury by a deputy attorney general, the county prosecuting attorney moved for the appointment of a special prosecuting attorney, and the district court entered an order appointing any duly appointed and sworn deputy attorney general as a special prosecuting attorney; any defect in the process of obtaining an indictment was cured. *State v. Summer*, — Idaho —, 76 P.3d 963 (2003).

Purpose.

The purpose of this section and former I.C.R. 6(d) (see now I.C.R. 6.4) is to guard the secrecy of the grand jury proceedings and assure that the jurors are free from undue influence and intimidation thereby allowing them to make an independent determination of probable cause. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

Stenographer.

Where prosecuting attorney has a stenographer in grand jury room for purpose of taking down evidence in shorthand for the use of the prosecution, unless it appears that accused suffered in some way by the presence of the stenographer, the action of the grand jury cannot be disturbed. *State v. Barber*, 13 Idaho 65, 88 P. 418 (1907).

Presence of stenographer for purpose of taking testimony in grand jury proceeding was not ground for attacking validity of indictment in absence of showing of prejudice. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Unauthorized Personnel.

The presence of unauthorized personnel does not constitute grounds for attacking the validity of an indictment, absent a showing of prejudice. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

The presence of the deputy clerk of the district court and state attorney general in the grand jury room will not require a dismissal of the indictment. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

Collateral References. Communicating with grand jury or member thereof as criminal offense. 112 A.L.R. 319.

19-1112. Proceedings to be secret. — Every member of the grand jury must keep secret whatever he himself, or any other grand juror may have

said, or in what manner he or any other grand juror may have voted on a matter before them; and such matters shall be subject to disclosure according to chapter 3, title 9, Idaho Code, but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person, upon a charge against such person for perjury in giving his testimony, or upon trial therefor. [Cr. Prac. 1864, §§ 213, 214; R.S., R.C., & C.L., § 7641; C.S., § 8800; I.C.A., § 19-1012; am. 1990, ch. 213, § 13, p. 480.]

Compiler's notes. Sections 12 and 14 of S.L. 1990, ch. 213 are compiled as §§ 20-525 and 20-213A, respectively.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

Cross ref. Disclosure of deliberations, a misdemeanor, § 18-4403.

Disclosure of indictment or presentment

before arrest, a misdemeanor, § 18-4402.

Cited in: *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953); *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970); *State v. Dutt*, — Idaho —, 73 P.3d 112 (Ct. App. 2003).

Collateral References. Privilege of self-incrimination before grand jury. 27 A.L.R. 139.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury. 127 A.L.R. 272.

19-1113. Juror not to be questioned. — A grand juror can not be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors. [Cr. Prac. 1864, § 215; R.S., R.C., & C.L., § 7642; C.S., § 8801; I.C.A., § 19-1013.]

Cited in: *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Collateral References. Expunging criticism of private citizen. 22 A.L.R. 1367; 106

A.L.R. 1383; 120 A.L.R. 437.

Responsibility of grand juror for defamation of character. 22 A.L.R. 1367; 106 A.L.R. 1383; 120 A.L.R. 437.

19-1114. Notice of refusal to give incriminating evidence — Agreement to testify with immunity — Perjury — Compelling answer. — In any criminal proceeding or in any investigation or proceeding before a grand jury in connection with any criminal offense, if a person has advised the prosecuting attorney that he will refuse to answer a question or produce evidence, if called as a witness, on the ground that he may be incriminated thereby, the person may agree in writing with the prosecuting attorney of the county to testify voluntarily pursuant to this section. Upon written request of such prosecuting attorney being made to the district court in and for that county, said district court shall approve such written agreement, unless the court finds that to do so would be clearly contrary to the public interest. If after court approval of such agreement, and if, but for this section, the person would have been privileged to withhold the answer given or the evidence produced by him, the answer given, or evidence produced, and any information directly or indirectly derived from the answer or evidence, may not be used against the person in any manner in a

criminal case but the person may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or in producing evidence in accordance with such agreement. If such person fails to give any answer or to produce any evidence in accordance with such agreement, that person shall be prosecuted or subjected to penalty or forfeiture in the same manner and to the same extent as he would be prosecuted or subjected to penalty or forfeiture but for this section: provided, that if such person fails to give any answer or to produce any evidence in accordance with such agreement, the prosecuting attorney may request the district court to compel the person to answer or produce evidence, in accordance with section 19-1115, Idaho Code. [1970, ch. 60, § 1, p. 146; am. 2000, ch. 238, § 1, p. 668.]

Compiler's notes. Section 3 of S.L. 2000, ch. 238 provided that the act shall be in full force and effect on and after July 1, 2000.

Sec. to sec. ref. This section is referred to in § 19-1121.

Cited in: *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), *aff'd*, 119 Idaho 1047, 812 P.2d 1208 (1991).

ANALYSIS

Applicability.

Construction.

Failure to request immunity.

Applicability.

This statute does not apply when a witness voluntarily gives testimony without demanding immunity. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Construction.

The language of this statute is entirely permissive in that it allows the prosecutor to

form an agreement granting testimonial immunity to an otherwise recalcitrant witness, but does not require that the prosecutor enter such an agreement every time he is a party to a plea agreement with a defendant who may become a witness in another prosecution. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Failure to Request Immunity.

The immunity power is granted solely to the prosecuting attorney and it was no abuse of this power not to grant immunity where immunity was not requested by the defense. *State v. Ramsey*, 99 Idaho 1, 576 P.2d 572 (1978).

Where a witness was subpoenaed by the prosecution and the defense made no request that she be granted immunity to testify, the prosecutor did not abuse his immunity power. *State v. Ramsey*, 99 Idaho 1, 576 P.2d 572 (1978).

19-1115. Refusal to give incriminating evidence — Compelling to answer or produce evidence — Immunity — Perjury. — In any criminal proceeding or in any investigation or proceeding before a grand jury in connection with any criminal offense, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the prosecuting attorney of the county in writing requests the district court in and for that county to order that person to answer the question or produce the evidence, a judge of the district court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, the answer given, or evidence produced, and any information directly or indirectly

derived from the answer or evidence, may not be used against the compelled person in any manner in a criminal case, except that he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. [1970, ch. 60, § 2, p. 146; am. 2000, ch. 238, § 2, p. 668.]

Compiler's notes. Section 3 of S.L. 1970, ch. 60 is compiled as § 19-1601.

Section 3 of S.L. 2000, ch. 238 provided that the act shall be in full force and effect on and after July 1, 2000.

Sec. to sec. ref. This section is referred to in § 19-1121.

Cited in: State v. Rodgers, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), aff'd, 119 Idaho 1047, 812 P.2d 1208 (1991).

ANALYSIS

Applicability.

Constitutionality.

Failure to request immunity.

Applicability.

Where the record did not reflect refusal to give evidence by any witness, this statute had no bearing on the case. State v. Pecor, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Constitutionality.

This statute does not offend the Fifth Amendment privilege against self-incrimination because immunity from prosecution is

granted and that immunity is coextensive with the privilege. Dutton v. District Court, 95 Idaho 720, 518 P.2d 1182 (1974).

Where petitioner was granted immunity and was ordered to testify at a criminal trial, court held this section did not offend article 1, section 7 of the Idaho constitution which guarantees right of one accused of a crime to a jury trial since he was not accused of a crime. Dutton v. District Court, 95 Idaho 720, 518 P.2d 1182 (1974).

Failure to Request Immunity.

Where a witness was subpoenaed by the prosecution and the defense made no request that she be granted immunity to testify, the prosecutor did not abuse his immunity power. State v. Ramsey, 99 Idaho 1, 576 P.2d 572 (1978).

The immunity power is granted solely to the prosecuting attorney and it was no abuse of this power not to grant immunity where immunity was not requested by the defense. State v. Ramsey, 99 Idaho 1, 576 P.2d 572 (1978).

19-1116. Special inquiry judge. — Upon the petition by affidavit of a prosecuting attorney of any county of the state of Idaho for the appointment of a special inquiry judge to conduct an inquiry into the existence of suspected crime or corruption within his jurisdiction, the administrative district court judge of the judicial district wherein the county is situated, may designate a judge from the magistrate division of the district court to preside over said inquiry. [I.C., § 19-1116, as added by 1980, ch. 251, § 1, p. 660.]

19-1117. Special inquiry judge — Petition for order. — (1) When the prosecuting attorney of any county has reason to suspect crime or corruption, within his jurisdiction, and there is reason to suspect that there are persons who may be able to give material testimony or provide material evidence concerning such suspected crime or corruption, such attorney may issue subpoenas directed to such persons commanding them to appear at a designated time and place in said county before the special inquiry judge and to then and there answer such questions under oath concerning the suspected crime or corruption as may be asked by the prosecuting attorney or special inquiry judge.

(2) At any time after service of such subpoenas and before the return date thereof, the prosecuting attorney may apply to the special inquiry judge for

an order vacating or modifying the subpoena on the grounds that such is in the public interest. Upon such application, the court may in its discretion vacate the subpoena, extend its return date, attach reasonable conditions to directions, or make such other qualification thereof as is appropriate.

(3) The proceedings to summon a person and compel him to testify or provide evidence shall as far as possible be the same as proceedings to summon witnesses and compel their attendance. Such persons shall receive only those fees paid witnesses in district court criminal trials. [I.C., § 19-1117, as added by 1980, ch. 251, § 2, p. 660.]

19-1118. Special inquiry judge — Disqualification from subsequent proceedings. — The judge serving as a special inquiry judge shall be disqualified from acting as a magistrate or judge in any subsequent court proceeding arising from such inquiry except alleged contempt for neglect or refusal to appear, testify or provide evidence at such inquiry in response to an order, summons or subpoena. [I.C., § 19-1118, as added by 1980, ch. 251, § 3, p. 660.]

19-1119. Special inquiry judge — Direction to prosecuting attorney to participate in proceedings in another county — Procedure. — Upon petition of a prosecuting attorney to the special inquiry judge that there is reason to suspect that there exists evidence of crime and corruption in another county, and with the concurrence of the special inquiry judge and prosecuting attorney of the other county, the special inquiry judge shall direct the prosecuting attorney of the initiating county to attend and participate in special inquiry judge proceedings in the other county held to inquire into crime and corruption which relates to crime or corruption under investigation in the initiating county. The proceedings of such special inquiry judge may be transcribed, certified and filed in the county of the initiating prosecuting attorney's jurisdiction at the expense of that county. [I.C., § 19-1119, as added by 1980, ch. 251, § 4, p. 660.]

19-1120. Witnesses — Attendance. — (1) A prosecuting attorney may call as a witness, in a special inquiry judge proceeding, any person suspected by him to possess information or knowledge relevant thereto and may issue legal process and subpoena to compel his attendance and the production of evidence.

(2) The special inquiry judge may cause to be called as a witness any person suspected by him to possess relevant information or knowledge. If the special inquiry judge desires to hear any such witness who was not called by a prosecuting attorney, it may direct the prosecuting attorney to issue and serve a subpoena upon such witness and the prosecuting attorney must comply with such direction. [I.C., § 19-1120, as added by 1980, ch. 251, § 5, p. 660.]

19-1121. Self-incrimination — Right to counsel. — Any individual called to testify before a special inquiry judge, whether as a witness or principal, if not represented by an attorney appearing with the witness

before the special inquiry judge, must be told of his privilege against self-incrimination. Such an individual must be informed that he has the right to have an attorney present to advise him as to his rights, obligations and duties before the special inquiry judge. Such attorney may be present as an observer and advisor during all proceedings, unless immunity has been granted pursuant to sections 19-1114, 19-1115 or 19-1122, Idaho Code. After immunity has been granted, such an individual may leave the special inquiry room to confer with his attorney. [I.C., § 19-1121, as added by 1980, ch. 251, § 6, p. 660.]

19-1122. Self-incrimination — Refusal to testify or give evidence — Procedure. — If in any proceedings before a special inquiry judge, a person refuses, or indicates in advance a refusal, to testify or provide evidence of any other kind on the ground that he may be incriminated thereby, and if a prosecuting attorney requests the court to order that person to testify or provide the evidence, the court shall then hold a hearing and shall so order unless it finds that to do so would be clearly contrary to the public interest, and that person shall comply with the order.

If, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but none of the testimony nor evidence presented by the witness relative to the issue under investigation before the special inquiry judge, nor any information directly or indirectly derived from his testimony, can be used against him in any further criminal proceeding. He may nevertheless be prosecuted for failing to comply with the order to answer, or for perjury or for offering false evidence to the special inquiry judge. [I.C., § 19-1122, as added by 1980, ch. 251, § 7, p. 660.]

Sec. to sec. ref. This section is referred to in § 19-1121.

19-1123. Secrecy enjoined — Exceptions — Use and availability of evidence. — (1) No individual, who is present during a special inquiry judge proceeding or who shall gain information with regard to said inquiry, shall disclose the testimony of a witness examined before the special inquiry judge or other evidence received by him, except such testimony or evidence may be disclosed in the following cases: when the district court requires disclosure of such testimony to determine whether it is consistent with testimony given by the witness before district court; by a prosecuting attorney when communicating with any law enforcement officer; upon a charge against the witness for perjury in giving his testimony in the special inquiry judge proceeding or upon trial therefor; or when permitted by the district court in the furtherance of justice.

(2) The prosecuting attorney shall have access to all special inquiry judge evidence and may introduce such evidence before any grand jury or judicial proceeding in which the same may be relevant.

(3) Any witness testimony, given before a special inquiry judge and relevant to any subsequent proceeding against the witness, shall be made

available to the witness upon proper application to the district court. The district court may also, upon proper application and upon a showing of good cause, make available to a defendant in a subsequent criminal proceeding other testimony or evidence when given or presented before a special inquiry judge, if the court finds that doing so is necessary to prevent an injustice and that there is no reason to believe that doing so would endanger the life or safety of any witness or his family. The cost of any such transcript made available shall be borne by the applicant. [I.C., § 19-1123, as added by 1980, ch. 251, § 8, p. 660.]

CHAPTER 12

PRESENTMENT AND PROCEEDINGS THEREON

SECTION.

19-1201. Presentment, how found.
19-1202. Must be presented to court.
19-1203. Court may order bench warrant.
19-1204. Issuance of bench warrant.

SECTION.

19-1205. Form of bench warrant.
19-1206. Service of bench warrant.
19-1207. Proceedings of magistrate.

19-1201. Presentment, how found. — A presentment cannot be found without the concurrence of at least twelve (12) grand jurors. When so found, it must be signed by the foreman. [Cr. Prac. 1864, § 216; R.S., R.C., & C.L., § 7647; C.S., § 8802; I.C.A., § 19-1101.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Grand jury, I.C.R. 6.1 to 6.9.

19-1202. Must be presented to court. — The presentment, when found, must be presented by the foreman, in presence of the grand jury, to the court, and must be filed with the clerk. [Cr. Prac. 1864, § 217; R.S., R.C., & C.L., § 7648; C.S., § 8803; I.C.A., § 19-1102.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1203. Court may order bench warrant. — If the facts stated in the presentment constitute a public offense, triable in the county, the court must direct the clerk to issue a bench warrant for the arrest of the defendant. [Cr. Prac. 1864, § 220; R.S., R.C., & C.L., § 7649; C.S., § 8804; I.C.A., § 19-1103.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1204. Issuance of bench warrant. — The clerk, on the application of the judge or prosecuting attorney, may accordingly, at any time after the

order, whether the court be sitting or not, issue a bench warrant under his signature and the seal of the court into one or more counties. [Cr. Prac. 1864, § 221; R.S., R.C., & C.L., § 7650; C.S., § 8805; I.C.A., § 19-1104.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1205. Form of bench warrant. — The bench warrant, upon presentment, must be substantially in the following form:

County of _____. The state of Idaho to any sheriff, constable, marshal or policeman in this state: A presentment having been made on the _____ day of _____, 19_____ to the district court of the county of _____, charging C.D. with the crime of _____, (designating it generally) you are therefore commanded forthwith to arrest the above-named C.D., and take him before E.F., a magistrate of this county, or in case of his absence or inability to act, before the nearest and most accessible magistrate in this county. Given under my hand with the seal of said court affixed, this _____ day of _____, 19_____.

By order of the court.

[Seal.]

G. H., Clerk.

[Cr. Prac. 1864, § 222; R.S., R.C., & C.L., § 7651; C.S., § 8806; I.C.A., § 19-1105.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1206. Service of bench warrant. — The bench warrant may be served in any county, and the officer serving it must proceed thereon as upon a warrant of arrest on an information. [Cr. Prac. 1864, § 223; R.S., R.C., & C.L., § 7652; C.S., § 8807; I.C.A., § 19-1106.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Proceedings on warrant of arrest, §§ 19-601 — 19-619.

19-1207. Proceedings of magistrate. — The magistrate, when the defendant is brought before him, must proceed upon the charges contained in the presentment, in the same manner as upon a warrant of arrest on an information. [Cr. Prac. 1864, § 224; R.S., R.C., & C.L., § 7653; C.S., § 8808; I.C.A., § 19-1107.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Examination before magistrate, §§ 19-801 — 19-825.

CHAPTER 13

INFORMATION AND PROCEEDINGS THEREON

SECTION.

- 19-1301. Power and jurisdiction of courts.
 19-1302. Filing and endorsement of information.
 19-1303. Statement of offense charged.
 19-1304. Provisions concerning indictment applicable to information.
 19-1305. Commitment and bail pending information.

SECTION.

- 19-1306. Prosecuting attorney to inquire into facts.
 19-1307. Grand jury to be drawn only by direction of judge.
 19-1308. Preliminary examination necessary.
 19-1309. Discovery and inspection.

19-1301. Power and jurisdiction of courts. — The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and process, and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments. [1890-1891, p. 184, § 1; reen. 1899, p. 125, § 1; reen. R.C. & C.L., § 7655; C.S., § 8809; I.C.A., § 19-1201.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Indictment and information, I.C.R. 7.

Prosecuting attorney to draw informations, § 31-2604.

Cited in: *Davis v. Burke*, 179 U.S. 399, 21 S. Ct. 210, 45 L. Ed. 249 (1900); *In re Marshall*, 6 Idaho 516, 56 P. 470 (1899); *Hodges v. Tucker*, 25 Idaho 563, 138 P. 1139 (1914); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930).

ANALYSIS

Change of venue.

Construction.

Change of Venue.

District court has no jurisdiction to transfer for trial from one county to another a criminal action not based on information or indictment. *State v. Cowen*, 29 Idaho 783, 162 P. 674 (1916).

Construction.

Informations are of equal dignity with indictments, subject only to limitations con-

tained in Const., art. 1, § 8, to the effect that defendant may be only accused by information after commitment by magistrate and that after charge has been ignored by grand jury no person shall be held to answer or for trial therefor upon information of public prosecutor. *In re Winn*, 28 Idaho 461, 154 P. 497 (1916).

After preliminary examination and filing of information court acquires jurisdiction of defendant and of offense with which he is charged, from which it cannot be deprived by any action of grand jury convened at subsequent term. *In re Winn*, 28 Idaho 461, 154 P. 497 (1916).

Section 19-1426 is equally applicable to an information filed by the prosecuting attorney under this statute. *State v. Thomas*, 82 Idaho 473, 355 P.2d 674 (1960).

Collateral References. 41 Am. Jur. 2d, Indictment and Informations, § 1 et seq.

42 C.J.S., Indictment and Informations, § 1 et seq.

Right to waive indictment, information and other formal accusations. 56 A.L.R.2d 837.

Power of assistant or deputy prosecuting or district attorney to file information in his own name. 80 A.L.R.2d 1067.

Immunity of prosecuting attorney or similar officer from action for false arrest or imprisonment. 79 A.L.R.3d 882.

19-1302. Filing and endorsement of information. — All informations shall be filed in the court having jurisdiction of the offense specified therein by the prosecuting attorney as informant to which he shall subscribe his name. [1890-1891, p. 184, § 2; reen. 1899, p. 125, § 2; am. R.C., § 7656;

am. 1913, ch. 41, p. 144; am. 1915, ch. 68, § 1, p. 176; reen. C.L., § 7656; C.S., § 8810; I.C.A., § 19-1202; am. 1989, ch. 343, § 1, p. 867.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Grand jury drawn only on direction of judge, § 19-1307.

Names of witnesses on indictment, § 19-1404.

Cited in: State v. Davis, 72 Idaho 115, 238 P.2d 450 (1951); State v. Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

ANALYSIS

Construction.

Delinquency of minors.

Duty of clerk.

Endorsement of additional witnesses.

Evidence.

Failure to endorse.

Failure to show prejudice.

Giving testimony when not endorsed.

Purpose.

Time of endorsement.

Verification.

Witnesses in rebuttal.

Construction.

This section is not mandatory in strict sense of that term; it is the duty of the trial court to enforce it, and of prosecutor to comply with its terms. But this requirement does not mean that information shall be quashed or that prosecution shall in no case be permitted to have names endorsed upon information after same is filed, where good cause is shown at time application is made why name or names were not endorsed at time information was filed, or why application was not sooner made after such information was filed. State v. Allen, 20 Idaho 263, 117 P. 849 (1911).

Delinquency of Minors.

In proceedings under § 16-1701 (repealed) where information charged delinquent minors with commission of alleged felonies, such information was not defective nor did it divest the probate court of jurisdiction. Hewlett v. Probate Court, 66 Idaho 690, 168 P.2d 77 (1946).

Duty of Clerk.

It is the duty of the clerk to file an information when presented by the prosecuting attorney; consent of judge or court to filing of same need not be obtained, and order of court or judge directing clerk not to file information so presented is without jurisdiction and does not excuse clerk from filing same. State v.

Quarles, 13 Idaho 252, 89 P. 636 (1907).

Endorsement of Additional Witnesses.

It is not error to permit prosecuting attorney to endorse names of additional witnesses to an information after trial jury has been impaneled, where it is shown that such witnesses were unknown to him at that time. State v. Wilmbusse, 8 Idaho 608, 70 P. 849 (1900); State v. Rooke, 10 Idaho 388, 79 P. 82 (1904); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

While it is not error to permit prosecuting attorney to endorse names of additional witnesses to an information after trial jury has been impaneled, where it is shown that such witnesses were unknown to him at that time, before permitting such addition the court must be satisfied that the names of such witnesses were not known to the prosecuting attorney at the time the information was filed. State v. Crea, 10 Idaho 88, 76 P. 1013 (1904).

If additional witnesses to those whose names are endorsed on indictment or information are discovered during trial, prosecuting attorney should be required to show where he obtained information concerning such witnesses, and, if showing is sufficient, court should then order names of witnesses placed on the indictment or information without delay. It is error to permit such additional witnesses to testify without their names being first endorsed on the indictment or information. State v. Barber, 13 Idaho 65, 88 P. 418 (1905).

Name of witness may be endorsed upon information after it is filed, where good cause is shown why it was not done before, as, by reason of the oversight and neglect of the prosecutor, and upon a showing that the defendant has not been and will not be misled or prejudiced by such failure; particularly where the court offers to grant a continuance, giving the defendant the necessary time in which to secure evidence to meet the testimony of the witness whose name is so endorsed. State v. Allen, 20 Idaho 263, 117 P. 849 (1911).

Test in such cases is whether or not defendant was surprised or prejudiced by endorsement of name of witness during trial. State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

Where there is no showing that defendant was surprised by addition of new name two weeks before trial or that there was insufficient time to prepare therefor, it will not be considered on appeal. State v. Stewart, 46 Idaho 646, 270 P. 140 (1928).

It was not error to allow name of state's witness to be endorsed on information at the

beginning of the trial and the accused's objection on the ground that he had no fair opportunity of meeting such was without merit in absence of a showing to that effect. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

Where the record shows the state did not know of the witness' testimony until the day before the trial and the state notified defense counsel immediately as to the substance of the witness' testimony the state's motion to have his name endorsed on the information was properly granted. *State v. Ziegler*, 107 Idaho 1133, 695 P.2d 1272 (Ct. App. 1985).

Evidence.

Where state charged defendant in good faith with involuntary manslaughter, as the result of an automobile collision due to physical facts existing at scene of the crime, and state was unable to produce any witness as to who was driving the car, and defendant testified that another party was driving the car, it was not error by the court when it admitted testimony of a third party that driver of the car was intoxicated, since such evidence was rebuttal and was not a part of the state's case in chief. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

Failure to Endorse.

Failure of the prosecuting attorney to indorse the name of a rebuttal witness on the information was not prejudicial to the defendant, especially where the court ordered the testimony of such witness stricken from the record and admonished the jury to disregard it. *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968).

Failure of a prosecuting attorney, who did not testify as a witness and who appeared only in his official capacity, to endorse his name as a witness on the information did not prejudice the defendant. *State v. Fisk*, 92 Idaho 675, 448 P.2d 768 (1968).

In prosecution for burglary in the first degree, it was error for the trial court to prohibit accomplices' mother from testifying merely because her name was not endorsed upon the information, where the state did not learn of the witness' information which would corroborate the accomplices' testimony until the day of the trial, and where defendant, in objecting to admission of the testimony, did not allege that he would be prejudiced by its admission. *State v. Nelson*, 97 Idaho 718, 552 P.2d 226 (1976).

The failure of the prosecution to give timely notice of a witness' status as a possible state witness did not constitute prejudicial error, where defendant at no time made an appropriate objection to the admission of such testimony, did not ask for a continuance to meet such testimony, was aware of the substance of the witness' testimony since she testified substantially the same at the preliminary hear-

ing and made no showing of how he was prejudiced by the failure of the prosecution to give notice. *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1978).

Failure to Show Prejudice.

Trial court properly allowed police officer to testify without having his name endorsed on the information where trial commenced three months after new rules of criminal procedure went into effect providing that upon order by court prosecutor must furnish defendant with list of names of all persons who may be called by state as witnesses, and where defendant failed to seek continuance or show any prejudice. *State v. Goodrick*, 95 Idaho 773, 519 P.2d 958 (1974), *aff'd*, 98 Idaho 124, 559 P.2d 303 (1977).

Giving Testimony When Not Endorsed.

It was proper for witness to testify at trial where court had granted motion of state to endorse his name as a witness though his name was not actually endorsed. *State v. Fedder*, 76 Idaho 535, 285 P.2d 802 (1955).

Purpose.

Purpose of this section is to inform defendant of names of witnesses who are to testify against him so that he may have opportunity to meet and controvert their evidence. *State v. Stewart*, 46 Idaho 646, 270 P. 140 (1928).

The purpose of the provisions of this section in requiring that state endorse names of known witnesses on information is to inform accused of names of witnesses who are to testify against him so that he may have the opportunity to meet and controvert such evidence. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

The purpose of the endorsement requirement in this section is essentially the same as the purpose of I.C.R. 16(b)(6), i.e., discovery by the defendant of the names of all persons having knowledge of relevant facts who may be called by the state as witnesses. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982).

Time of Endorsement.

Action of trial court in granting permission to the state to endorse names of witnesses three days prior to trial was proper where trial was postponed and not held until 50 days thereafter, since the defendant had sufficient time to prepare to meet the testimony of the endorsed witnesses. *State v. Fedder*, 76 Idaho 535, 285 P.2d 802 (1955).

Test to be applied in cases where names of witnesses are sought to be endorsed on information after the trial begins is whether defendant would be surprised or prejudiced by such action, if allowed. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Great caution should be exercised before permitting a witness' name to be endorsed on

information during the course of trial; it is only in those situations where no prejudice to defendant would result that the endorsement should ever be allowed. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Application of defendant to postpone trial on ground of surprise at introduction of witness whose name is not endorsed on information must be supported by affidavit or other evidence showing surprise, in the absence of which the application should be denied. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

If defendant was prejudiced or surprised by testimony of state's witness whose name was indorsed on information after trial began he should have moved for continuance of trial at the time the state moved for endorsement of her name on the information and the permitting of such endorsement over defendant's objection that motion came too late was not reversible error for law vests discretion in the

trial court in ruling on such matters. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Where motion to endorse state's witnesses at least six days before trial and notice was filed six days prior to filing the motion, the notice and motion were timely filed and defendant had ample time during which he might prepare to meet testimony of witnesses. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Verification.

Statute does not require information to be verified. *State v. Ricks*, 34 Idaho 122, 201 P. 827 (1921).

Witnesses in Rebuttal.

This section does not require endorsement of names of witnesses on the information that are called for the purpose of rebutting testimony given on behalf of the defendant. *State v. Silva*, 21 Idaho 247, 120 P. 835 (1912).

19-1303. Statement of offense charged. — The offense charged in all informations shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases, and in all cases defendant or defendants shall have the same rights as to proceedings therein as he or they would have if prosecuted for the same offense upon indictment. [1890-1891, p. 184, § 3; am. 1893, p. 164, § 1; reen. 1899, p. 125, § 3; reen. R.C. & C.L., § 7657; C.S., § 8811; I.C.A., § 19-1203.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Complaint, information or indictment need not negate statutory defenses to certain offenses, § 19-1433.

Requisites of indictment, §§ 19-1409 — 19-1412, 19-1414 — 19-1418.

Cited in: *State v. Lundquist*, 134 Idaho 831, 11 P.3d 27 (2000).

ANALYSIS

Amendment.

False pretenses.

Force and violence.

Multiple charges.

Name of offense.

Previous conviction.

Sufficiency of allegations.

Variances of information.

Amendment.

In a burglary prosecution since the trial court's allowing the prosecution to amend the information adding the words "in the nighttime" did not add or change the offense and the accused was neither surprised nor preju-

diced by such amendment, the court did not err. *State v. Ranstrom*, 94 Idaho 348, 487 P.2d 942 (1971).

False Pretenses.

Where information charges presenting for payment certain false claims, to wit, bonds, and refers to the bonds as being false and fraudulent but states in detail facts showing presenting for payment genuine bonds as the basis of a false claim, the defendant is not prejudiced and the information is sufficient. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Force and Violence.

Information charging crime of assault with intent to commit rape, which alleges that defendant assaulted prosecutrix with intent to have sexual intercourse with her, "wilfully, feloniously, violently, unlawfully and against her will, wish, consent and resistance," sufficiently alleges intent to accomplish the felonious act by force, and violence. *State v. Neil*, 13 Idaho 539, 90 P. 860, 91 P. 318 (1907).

Multiple Charges.

Information charging more than one offense is open to demurrer. *State v. Bilboa*, 33 Idaho 128, 190 P. 248 (1920); *State v. Hall*, 33 Idaho 135, 190 P. 251 (1920); *State v. Cooper*, 35 Idaho 73, 204 P. 204 (1922).

Where information contained three counts, defendant's plea of not guilty applied to but one offense, and sentences under two of the counts were surplusage and void. In re Bottjer, 45 Idaho 168, 260 P. 1095 (1927).

That indictment or information alleges more than one offense is ground for motion in arrest of judgment, unless objection has been waived by failure to demur. *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929).

Name of Offense.

Where information incorrectly names an offense, but states special facts showing what offense really is, defendant is not prejudiced by the mistake in designating offense. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Previous Conviction.

Information charging defendant with being "a persistent violator" of a law against drinking in public, must set out the previous conviction specifically. *State v. Scheminsky*, 31 Idaho 504, 174 P. 611 (1918).

Sufficiency of Allegations.

An information charging the unlawful and felonious taking of property from the possession of a named owner, giving a description of the property and fixing the time and venue, is sufficient on demurrer. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Information will not be held insufficient by reason of any defect or imperfection in matter of form not tending to the prejudice of a substantial right of accused. *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916); *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916).

Information must contain statement of acts constituting the offense in ordinary and concise language, and in such manner as to enable person of common understanding to know what is intended to be charged thereby. *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916); *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Indictment or information must allege all the facts constituting the offense sought to be charged. *State v. Cole*, 31 Idaho 603, 174 P. 131 (1918); *State v. Scheminsky*, 31 Idaho 504, 174 P. 611 (1918).

Information for murder charging that defendant on preliminary examination was held to answer for the crime of murder described therein, although it could have been improved, was not fatally defective. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Information couched in language of statute is usually sufficient. *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Accused has the right to be informed, in all criminal prosecutions, both by the law and

the information, what acts and conduct are prohibited and made punishable. *State v. Burns*, 53 Idaho 418, 23 P.2d 731 (1933).

This section makes the statutes governing the requisites of indictments applicable to informations. (§§ 19-1409 — 19-1412.) *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Information complied with requirements of Code as to crime of involuntary manslaughter, when it charged defendant with driving a motor vehicle on a public highway at a designated time and place in a negligent and careless manner at an excessive rate of speed upon the wrong side of the highway while intoxicated so as to endanger lives of persons on the highway, and that he did unlawfully, wilfully, and feloniously drive his vehicle against a vehicle of another, and six designated persons were killed, and that defendant did wilfully, unlawfully, and feloniously, but without malice, kill said six persons, as information charged but one offense, and was sufficient to put defendant on trial on theory that he was either a principal or an accessory. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

Information was not subject to dismissal on ground of uncertainty where it alleged that defendant at designated place in county and state while under the influence of intoxicating liquor carelessly, negligently, recklessly, and without due caution and wilfully, unlawfully, and feloniously, but without malice drove automobile across highway at high speed without warning against body of a human being with great force producing injuries upon body of designated person from which he died, and thereby committed manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Information charging defendant with operating a motor vehicle on the public highway and that he did wilfully, unlawfully, negligently, recklessly and in a careless manner and while under the influence of intoxicating liquor and without caution and circumspection in regard for the safety of others, drive his automobile across the center line of said highway and on the left side of the road in the front of another automobile and that a passenger as a result received mortal wounds and injuries and in such manner such defendant did in reckless disregard for the safety of others, but without malice, kill decedent, charged one offense and was sufficient. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

An information alleging facts constituting both assault with a deadly weapon and assault with intent to commit murder and entitled "Assault With a Deadly Weapon With Intent to Murder" was sufficient to charge assault with intent to commit murder. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968),

cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

A charge that an accused took money from the person, or from the immediate presence of the person, and that it was taken against his will and by means of force or fear, constituted the single charge of robbery and such a charge afforded the accused proper means by which to prepare a defense of the particular crime charged. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

The sufficiency of an information ultimately depends on whether it fulfills the basic functions of the pleading instrument. Under this functional analysis, it must be determined first, whether the information contains the elements of the offense charged and fairly informs the defendant of the charges against which he must defend, and second, whether it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

19-1304. Provisions concerning indictment applicable to information. — The provisions of this code in relation to indictments, and all other provisions of law applying to prosecutions upon indictments, to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the execution of any sentence, and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to informations and all prosecutions and proceedings thereon. [1890-1891, p. 184, § 4; reen. 1899, p. 125, § 4; am. R.C. & C.L., § 7658; C.S., § 8812; I.C.A., § 19-1204.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Clark*, 4 Idaho 7, 35 P. 710 (1894); *In re Marshall*, 6 Idaho 516, 56 P. 470 (1899); *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921); *State v. Cooper*, 35 Idaho 73, 204 P. 204 (1922); *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923); *State v. Foell*, 37 Idaho 722, 217 P. 608 (1923); *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924); *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927); *In re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927); *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930); *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955); *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959); *State v. Bauman*, 89 Idaho 519, 406 P.2d 810 (1965); *State v. Mowrey*, 91

The information included all of the elements of the offense and sufficiently informed defendant of those acts for which he was accused, the pleading identified the substance that defendant was alleged to have possessed and the date and place of possession, and in the absence of any suggestion in the information that the state was charging defendant with possession of only a portion of the cocaine found on that date, defendant was on notice that he must be prepared to present a defense regarding all of the cocaine so found. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Variances of Information.

Aggravated battery convictions were vacated because the variance between the information and the jury instructions for the two counts of aggravated battery deprived defendant of his right to fair notice of the charges. *State v. Brazil*, 136 Idaho 327, 33 P.3d 218 (Ct. App. 2001).

Idaho 693, 429 P.2d 425 (1967); *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968); *State v. Shannon*, 95 Idaho 299, 507 P.2d 808 (1973); *Martin v. Lyons*, 98 Idaho 102, 558 P.2d 1063 (1977); *State v. Hobson*, 99 Idaho 200, 579 P.2d 697 (1978); *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982); *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

ANALYSIS

Amendment.
General saving clause.
Statutes applicable.
Sufficiency of allegations.

Amendment.

In a burglary prosecution since the trial court's allowing the prosecution to amend the information adding the words "in the nighttime" did not add or change the offense and the accused was neither surprised nor prejudiced by such amendment, the court did not err. *State v. Ranstrom*, 94 Idaho 348, 487 P.2d 942 (1971).

General Saving Clause.

Prosecution of crime committed under an act, whether by way of information or indictment, is not barred by repeal of act, since general saving clause, § 67-513, continues provisions of repealed act as to crimes committed prior to repeal. *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954).

Statutes Applicable.

This section makes § 19-1601 applicable to informations so that an information may be quashed only on the grounds prescribed in that section. *State v. Hunt*, 57 Idaho 122, 62 P.2d 1372 (1936).

The statute providing for indictment for perjury is equally applicable to information for perjury. *State v. Crawford*, 94 Idaho 463, 491 P.2d 180 (1971).

Sufficiency of Allegations.

The accused has a right to be informed not only by the law, but also by the information or

indictment, what acts and conducts are prohibited and made punishable, and what acts or conduct he is called upon to answer. *State v. Burns*, 53 Idaho 418, 23 P.2d 731 (1933).

Where information states facts sufficient to constitute both assault and battery, if it be stated that accused is charged with assault and no statement is made that he is accused of battery, this is an election to proceed against him for assault alone and the information is not duplicitous. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

Where information alleged that burglary was committed on or about the second day of June and the proof was that it was committed sometime before midnight on June first, such evidence was not fatal since it is sufficient if proof show the commission of crime at any time prior to filing of information and within statute of limitations. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

19-1305. Commitment and bail pending information. — Any person who may according to law be committed to jail, or become recognized or held to bail with sureties for his appearance in court to answer to any indictment may, in like manner, so be committed to jail or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be. [1890-1891, p. 184, § 5; reen. 1899, p. 125, § 5; reen. R.C. & C.L., § 7659; C.S., § 8813; I.C.A., § 19-1205.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1306. Prosecuting attorney to inquire into facts. — It shall be the duty of the prosecuting attorney to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense wherein the offender shall be committed to jail or become recognized or held to bail, and if the prosecuting attorney shall determine in any such case that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and such statement shall be filed at and during the term of court at which the offender shall be held for his appearance: provided, that in such case such court may examine said statement, together with the evidence filed in the case; and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial. [1890-1891, p. 184, § 6; reen. 1899, p. 125, § 6; reen. R.C. & C.L., § 7660; C.S., § 8814; I.C.A., § 19-1206.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Wilbanks, 95 Idaho 346, 509 P.2d 331 (1973).

Discretion in Filing Complaint.

It cannot be said that the prosecuting attorney abused his discretion by failing to pursue

criminal complaints against the defendants when he first received information of the Bureau of Narcotics' investigation, since the prosecuting attorney's office apparently decided not to file complaints in deference to the bureau's determination that the filing of complaints against the two defendants would possibly endanger the lives and property of all special agents connected to the investigation. State v. Murphy, 99 Idaho 511, 584 P.2d 1236 (1978).

19-1307. Grand jury to be drawn only by direction of judge. —

Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within the state, as provided by law, unless the judge thereof shall so direct in writing, under his hand, and filed with the clerk of said court. [1890-1891, p. 184, § 7; reen. 1899, p. 125, § 7; reen. R.C. & C.L., § 8815; I.C.A., § 19-1207.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Constitutionality.

This section authorizes district judge sit-

ting at chambers in one county in his district, to make an order for a grand jury in another county, and is not, because it confers such authority, in conflict with Const., art. 1, § 8, which provides that a grand jury may be summoned upon order of "district court." State v. Barber, 13 Idaho 65, 88 P. 418 (1907).

19-1308. Preliminary examination necessary. —

No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination: provided, that information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon, as provided by law in like cases of demand upon indictment filed. [1890-1891, p. 184, § 8; reen. 1899, p. 125, § 8; reen. R.C. & C.L., § 7662; C.S., § 8816; I.C.A., § 19-1208.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Commitment by magistrate prerequisite to information, Const., Art. 1, § 8.

Preliminary examination, § 19-801 et seq.

Cited in: State v. Shannon, 95 Idaho 299, 507 P.2d 808 (1973).

ANALYSIS

Allegation of examination.
Amended information.
Construction.
Fugitive from justice.
Parties.
Persistent violator.
Setting aside information.
Waiver of examination.

Allegation of Examination.

It is not necessary for the information to

allege that defendant has had a preliminary examination, or waived same, but it is better practice to make such averment. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Amended Information.

A defendant who waived a preliminary hearing on a charge of "aggravated assault," although the facts alleged in the information constituted aggravated battery, was not entitled to a new preliminary hearing on a charge of "aggravated battery" after the information was amended by changing the caption from "Aggravated Assault" to "Aggravated Battery" without changing the allegations of the complaint. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Amendment to information did not have the effect of charging a greater or different offense such that defendant, who was held for trial without a preliminary hearing, was denied his constitutional and statutory right to such hearing. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

Construction.

This section is mandatory and one accused of crime cannot be prosecuted by information until he shall have had a preliminary examination, or until he has waived his right to such examination, unless he is a fugitive from justice. *State v. Braithwaite*, 3 Idaho 119, 27 P. 731 (1891); *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Where in support of a motion to quash the information defendant filed an affidavit that he had not had a preliminary hearing, it became the duty of the prosecuting attorney to refute such affidavit by the production of the depositions taken on preliminary examination or by other competent proof, and upon his failure so to do, the motion to quash should be sustained. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Public prosecutor has no power to file an information against an accused person until after such person has been committed by a magistrate; and then he can file his information only for offense for which accused was committed. *State v. McGreevey*, 17 Idaho 453, 105 P. 1047 (1909).

Fugitive from Justice.

Where one of several defendants is a fugitive from justice that fact may be properly inserted in information. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Parties.

Information, which charged defendant with commission of crime was not defective in that other participants were not named in information, if other participants were never apprehended or given a preliminary examination, since accused may be tried as either a principal or accessory. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

Persistent Violator.

It was proper to file an information charging the defendant with arson in the first degree and with being a persistent violator, although he had had a preliminary hearing only on the charge of arson, the allegation that he was a persistent violator referring not to an additional offense but only to the status of the defendant if convicted for the purpose of determining punishment. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Setting Aside Information.

An information will not be set aside on the ground that defendant had no preliminary examination as required by law, where motion is based on fact that witness who testified on such preliminary examination failed, on objection of counsel, to answer questions incriminating her. *State v. Bond*, 12 Idaho 424, 86 P. 43 (1906).

Waiver of Examination.

This section authorizes defendant to waive preliminary examination. *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

Party may waive preliminary examination, and advice of officer, where it does not amount to coercion, will not affect this right. *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

Defendant may waive preliminary examination through codefendant authorized to act for him. *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

19-1309. Discovery and inspection. — (1) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant:

- (a) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney,
- (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or

copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, and

(c) recorded testimony of the defendant before a grand jury.

(2) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subsection (1) (b), this section does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by state agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) to agents of the state.

(3) If the court grants relief sought by the defendant under subsection (1) (b) or subsection (2) of this section, it may, upon motion of the state, condition its order by requiring that the defendant permit the state to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the state's case and that the request is reasonable. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his agents or attorneys.

(4) An order of the court granting relief under this section shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(5) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the state, the court may permit the state to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the state's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(6) A motion under this section may be made only within ten (10) days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this section. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(7) If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material

previously requested or ordered which is subject to discovery or inspection under the section, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. [I.C., § 19-1309, as added by 1969, ch. 243, § 1, p. 761.]

Cross ref. Discovery and inspection, I.C.R. 16.

Cited in: *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

ANALYSIS

Amplified by criminal rules.
Purpose.

Amplified by Criminal Rules.

I.C.R. 16 does not refer to this section, but is obviously designed to amplify its provisions in an effort to assist prosecutors and defense counsel in utilizing discovery processes. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1990).

Purpose.

The plain intent of this section is to require discovery by both the state and defendant in advance of trial, and presumably, to expedite criminal trials and diminish opportunities for surprise. *State v. Thompson*, 119 Idaho 67, 803 P.2d 973 (1990).

Collateral References. 21 Am. Jur. 2d, Criminal Law, § 1 et seq.

22 C.J.S., Criminal Law, § 1 et seq.

Prosecution's right to pretrial discovery, inspection, and disclosure. 96 A.L.R.2d 1224.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 A.L.R.3d 181.

Accused's right to inspection of minutes of state grand jury. 20 A.L.R.3d 7.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 A.L.R.3d 571.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case. 86 A.L.R.3d 1170.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process. 93 A.L.R.5th 527.

CHAPTER 14

INDICTMENT

SECTION.

- 19-1401. Indictment, how found.
- 19-1402. Failure to find indictment — Return of depositions.
- 19-1403. Resubmission of charge after dismissal.
- 19-1404. Endorsement of names of witnesses.
- 19-1405. Presentment and filing of indictment.
- 19-1406. Indictment of defendant not in custody.
- 19-1407. Rules of pleading.
- 19-1408. First pleading is indictment.
- 19-1409. Requirements of indictment.
- 19-1410. Form of indictment.
- 19-1411. Certainty required of indictment.
- 19-1412. Indictment by fictitious name.
- 19-1413. [Repealed.]

SECTION.

- 19-1414. Allegation as to time.
- 19-1415. Erroneous designation of person injured.
- 19-1416. Construction of words.
- 19-1417. Words of statute.
- 19-1418. Sufficiency of indictment.
- 19-1419. Defects of form.
- 19-1420. Amendment of indictment.
- 19-1421. Presumptions and facts judicially noticed.
- 19-1422. Pleading judgments.
- 19-1423. Pleading private statutes.
- 19-1424. Indictment for libel.
- 19-1425. Misdescription of forged instrument.
- 19-1426. Indictment for perjury.
- 19-1427. Indictment for larceny or embezzlement.

SECTION.

- 19-1428. Indictment for selling obscene books.
- 19-1429. Conviction or acquittal of several defendants.
- 19-1430. Distinction between accessories and principals abolished.

SECTION.

- 19-1431. Trial of accessories without principal.
- 19-1432. Charging two or more offenses in same indictment.
- 19-1433. Unnecessary to negate statutory defenses in certain cases.

19-1401. Indictment, how found. — An indictment cannot be found without the concurrence of at least twelve (12) grand jurors. When so found it must be endorsed, a true bill, and the endorsement must be signed by the foreman of the grand jury. [Cr. Prac. 1864, § 225; R.S., R.C., & C.L., § 7665; C.S., § 8817; I.C.A., § 19-1301.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Indictment and information, I.C.R. 7.

Prosecuting attorney to draw indictments, § 31-2604.

ANALYSIS

Informations.

Presumptions.

Validity.

Informations.

Informations are of equal dignity with indictments, subject only to Const., art. 1, § 8, that defendant may be accused by information after commitment by magistrate and that after charge has been ignored by grand jury no information may be filed. In re Winn, 28 Idaho 461, 154 P. 497 (1916).

Presumptions.

Indictment endorsed "A true bill. A Rossi, foreman. Presented and filed in open court in presence of the grand jury," will be presumed, in absence of a showing to the contrary, to have been found by a legal grand jury although there is no showing of the number of persons comprising grand jury. People v. Buchanan, 1 Idaho 681 (1878).

Validity.

Indictment found while district court is in recess is not invalid. Rich v. Varian, 36 Idaho 355, 210 P. 1011 (1922).

Indictment was not invalid on the ground that there was no endorsement of true bill signed by foreman where words "true bill" were placed under title of court just before body of indictment and name of foreman with title appeared below body of indictment since error if any was not prejudicial as there was a

substantial compliance with the statute. Gasper v. District Court, 74 Idaho 388, 264 P.2d 679 (1953).

Collateral References. 41 Am. Jur. 2d, Indictment and Informations, § 1 et seq.

42 C.J.S., Indictment and Informations, § 1 et seq.

Absence of grand jurors during hearing as affecting indictment. 156 A.L.R. 248.

Right to waive indictment, information, or other formal accusation. 56 A.L.R.2d 837.

Sufficiency of description of stolen property in indictment or information for receiving it. 99 A.L.R.2d 813.

Power of court to make or permit amendment of indictment with respect to allegations as to time. 14 A.L.R.3d 1297.

Power of court to make or permit amendment of indictment with respect to allegations as to place. 14 A.L.R.3d 1335.

Power of court to make or permit amendment of indictment with respect to allegations as to name, status, or description of persons or organizations. 14 A.L.R.3d 1358.

Sufficiency of indictment, information, or other form of criminal complaint, omitting or misstating middle name or initial of person named therein. 15 A.L.R.3d 968.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money. 15 A.L.R.3d 1357.

Power of court to make or permit amendment of indictment with respect to allegations as to money. 16 A.L.R.3d 1076.

Power of court to make or permit amendment of indictment with respect to allegations as to criminal intent or scienter. 16 A.L.R.3d 1093.

Power of court to make or permit amendment of indictment. 17 A.L.R.3d 1181.

Prior convictions: Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions. 17 A.L.R.3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations

as to nature of activity, happening or circumstances. 17 A.L.R.3d 1285.

Admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or at conviction. 37 A.L.R.3d 612.

Validity of indictment where grand jury

heard incompetent witness. 39 A.L.R.3d 1064.

Necessity of alleging in indictment or information limitation — tolling facts. 52 A.L.R.3d 922.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment. 23 A.L.R.4th 397.

19-1402. Failure to find indictment — Return of depositions. — If twelve (12) grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the depositions, if any, transmitted to them must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed. [Cr. Prac. 1864, § 226; R.S., R.C., & C.L., § 7666; C.S., § 8818; I.C.A., § 19-1302.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Collateral References. Power of grand jury to withdraw or alter indictment, or return of "not a true bill." 82 A.L.R. 1057.

19-1403. Resubmission of charge after dismissal. — The dismissal of the charge does not prevent its resubmission to a grand jury as often as the court may direct, but without such direction it cannot be resubmitted. [Cr. Prac. 1864, § 227; R.S., R.C., & C.L., § 7667; C.S., § 8819; I.C.A., § 19-1303.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1404. Endorsement of names of witnesses. — When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court. [Cr. Prac. 1864, § 228; R.S., R.C., & C.L., § 7668; C.S., § 8820; I.C.A., § 19-1304.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Endorsement of information, § 19-1302.

Cited in: State v. Allen, 20 Idaho 263, 117 P. 849 (1911).

Endorsement of Additional Witnesses.

This provision of the statute is mandatory and should be enforced at all times in prosecutions either by indictment or information, and if additional witnesses to those whose

names are indorsed on indictment or information are discovered during trial, prosecuting attorney should be required to show where he obtained information concerning such witnesses and, if showing is sufficient, court should then order names of witnesses placed on indictment or information without delay. It is error to permit such additional witnesses to testify without their names first being indorsed on indictment or information. State v. Barber, 13 Idaho 65, 88 P. 418 (1907).

Where prosecuting attorney served upon counsel for defendant a notice that when the case was called for trial he would move the court for an order permitting him to indorse the names of two additional witnesses on the information, and by reason of the fact that no

formal motion but only a notice of intention to move for such an order was in the record, the court continued the trial until after a formal motion had been filed and then made an order permitting the endorsement of the names upon the information, the court committed no

error in permitting such endorsement of names where defendant was not taken by surprise nor placed at any undue disadvantage thereby. *State v. Gailey*, 69 Idaho 146, 204 P.2d 254 (1949).

19-1405. Presentment and filing of indictment. — An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court, and must be filed with the clerk. [Cr. Prac. 1864, § 229; R.S., R.C., & C.L., § 7669; C.S., § 8821; I.C.A., § 19-1305.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Duty of Clerk.

It is the duty of the clerk to file indictment when presented by the grand jury, and consent of the judge or court to the filing of same need not be obtained, and an order of court or

judge directing clerk not to file indictment so presented is without jurisdiction, and does not excuse clerk from filing the same. *State v. Quarles*, 13 Idaho 252, 89 P. 636 (1907).

Collateral References. What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury. 24 A.L.R. 1002.

Grand jury's failure or refusal to find indictment upon investigation as affecting right to file information. 120 A.L.R. 713.

19-1406. Indictment of defendant not in custody. — When an indictment is found against a defendant not in custody, the same proceedings must be had as are described by sections 19-1501 to 19-1516, against a defendant who fails to appear for arraignment. [Cr. Prac. 1864, § 230; R.S., R.C., & C.L., § 7670; C.S., § 8822; I.C.A., § 19-1306.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1407. Rules of pleading. — All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this code. [Cr. Prac. 1864, § 231; R.S., R.C., & C.L., § 7675; C.S., § 8823; I.C.A., § 19-1307.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Provisions relating to indictment apply to information, § 19-1304.

Cited in: *State v. Neil*, 58 Idaho 359, 74 P.2d 586 (1937); *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941).

Plea of jeopardy.

Procedure exclusive.

Common-Law Forms Abolished.

This section was enacted in order to abrogate the strictness of the common-law form of indictment, and it is not necessary that indictment or information should charge offense with all the strictness and particularity required at common law. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Indictment or Information.

Statutes governing requisites of indictments apply to informations. *State v.*

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Common-law forms abolished.
Indictment or information.

McMahan, 57 Idaho 240, 65 P.2d 156 (1937).

Plea of Jeopardy.

A plea of once in jeopardy presents an issue of fact to be tried by jury unless trial by jury be waived. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

Procedure Exclusive.

There is no statutory authority for enter-

taining demurrer to plea of once in jeopardy, as appears from an examination of §§ 19-1712, 19-1901, 19-1902, and Const., Art. 1, § 7. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

19-1408. First pleading is indictment. — The first pleading on the part of the people is the indictment. [Cr. Prac. 1864, § 232; R.S., R.C., & C.L., § 7676; C.S., § 8824; I.C.A., § 19-1308.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930).

19-1409. Requirements of indictment. — The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. [Cr. Prac. 1864, § 233; R.S., R.C., & C.L., § 7677; C.S., § 8825; I.C.A., § 19-1309.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred in § 19-1703.

Cited in: *Perry v. State*, 4 Idaho 224, 38 P. 655 (1894); *State v. Webb*, 6 Idaho 428, 55 P. 892 (1899); *State v. Adams*, 9 Idaho 582, 75 P. 258 (1904); *State v. Collett*, 9 Idaho 608, 75 P. 271 (1904); *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904); *State v. Wetter*, 11 Idaho 433, 83 P. 341 (1905); *State v. Swensen*, 13 Idaho 1, 81 P. 379 (1905); *State v. Neil*, 13 Idaho 539, 90 P. 860, 91 P. 318 (1907); *In re Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911); *State v. Dingman*, 37 Idaho 253, 219 P. 760 (1923); *State v. Peters*, 43 Idaho 564, 253 P. 842 (1927); *State v. Wheeler*, 70 Idaho 455, 220 P.2d 687 (1950); *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968); *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989); *State v. Wilhelm*, 135 Idaho 111, 15 P.3d 824 (Ct. App. 2000).

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Application of Section.

The pleading requirements of this section and §§ 19-1410 and 19-1411 are in conflict with § 19-3901. The first three apply to indictments and informations before the district court, whereas the last statute is applicable to criminal complaints in probate courts, justice of the peace, and police courts. The language of the statutes, although not identical, has the same substantive requirements. A conviction of an offense pleaded with the particularity required of the latter, could be pleaded as a bar to another charge for the same offense. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

Burglary.

Burglary information following the language of the statute charging felonious entry of a barn, with intent to commit larceny, sufficiently complies with this section. *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938).

Complaints.

Sections 19-1409 — 19-1411 are not applicable to complaints filed in probate and justice courts charging misdemeanors. *State v. Griffith*, 55 Idaho 60, 37 P.2d 402 (1934).

Facts of Offense.

An information which merely names of offense without in any way stating how it was committed, or the acts committed which it is claimed consummated or culminated in the commission of offense, is insufficient and will not serve to put defendant upon his trial. *State v. Smith*, 25 Idaho 541, 138 P. 1107 (1914). (This case was overruled by *State v. Lundhigh*, 30 Idaho 365, 164 P. 691 (1917) which was itself overruled by *State v. McMahan*, 57 Idaho 248, 65 P.2d 159 (1937) which reinstated the law as propounded in *Smith*).

Offense need not be named. The facts alleged, rather than designation of offense, control. *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915).

Where an information incorrectly names offense, but states special facts showing what it really is, defendant is not prejudiced by the mistake in designation. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Information was not subject to dismissal on ground of uncertainty where it alleged that defendant at designated place in county and state while under the influence of intoxicating liquor carelessly, negligently, recklessly, and without due caution and wilfully, unlawfully, feloniously, but without malice drove automobile across highway at high speed without warning against body of a human being with great force producing injuries upon body of designated person from which he died, and thereby committed manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Where information charged defendant with the sale of liquor without a license to one Beman when the evidence was uncontradicted that such sale was made to one Howard, variance was of such substantial nature as clearly to mislead defendant in preparation of his case and likely to place him in second jeopardy for the offense, thus his motion for arrest of judgment should have been granted. *State v. Whitlock*, 82 Idaho 540, 356 P.2d 492 (1960).

There was no prejudice to a defendant charged with aggravated battery in an information that failed to describe the exact nature of the injuries inflicted and stated only that they were grievous in the terms of the

statute defining such offense. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

If the facts constituting the offense are sufficiently stated in the information, the mere giving of an erroneous offense characterization is immaterial; the amending information merely redefined the same offense, and there was no showing of prejudice to defendant by allowing the information to be amended three days before his trial. *State v. Darbin*, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

Failure to State Title.

Failure to state the title of an action is not fatal. *People v. Walters*, 1 Idaho 271.

False Pretenses.

Information charging that defendant by false pretenses "induced" his victim to pay over a certain sum of money to defendant, sufficiently charged that the money was in fact paid over. *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934).

Forgery.

Where an information charges that the defendant passed a check purporting to be that of a nonexistent individual and, by way of videlicet, sets out a copy of the alleged check which shows it to be that of an existent corporation signed on behalf of said corporation with the name of the individual alleged to be nonexistent, the videlicet will control over the purport clause. *State v. Bishop*, 89 Idaho 416, 405 P.2d 970 (1965).

Homicide.

The failure of an indictment for murder to allege the killing to have been deliberate and premeditated is not fatal where it alleges the killing to have been done with malice aforethought. *People v. Ah Choy*, 1 Idaho 317 (1870); *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903).

Definitions of various degrees of murder need not be set out in indictment. *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895).

Indictment for murder charging that the assault was unlawfully, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought made upon deceased is sufficient. *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903).

Allegation that defendant at specified time and place did "kill and murder one John H. Hays," is a sufficient allegation that the latter died. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905).

Allegation that defendant at specified time and place, "then and there being, did then and there wilfully, unlawfully and feloniously, in a manner unknown, strike, beat, wound, and ill-treat" the victim, was a sufficient allega-

tion of the means whereby the homicide was effected. *State v. Squires*, 15 Idaho 545, 98 P. 413 (1908).

For a number of years it was deemed sufficient in this state to charge murder in general terms, however, the present rule requires the acts or facts of the killing to be alleged. *State v. Smith*, 25 Idaho 541, 138 P. 1107 (1914); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941). For former rule, see *People v. Walters*, 1 Idaho 271 (1869); *Perry v. State*, 4 Idaho 224, 38 P. 655 (1894); *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905); *State v. Squires*, 15 Idaho 545, 98 P. 413 (1908); *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911); *In re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Information for murder charging that defendant was held on preliminary examination to answer for the crime of murder described therein, although it could have been improved, was not fatally defective. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Information charging the driving of an auto negligently and without due caution by driving it at such a rate of speed and in such a manner as to endanger the lives of persons passing on the highway and fellow-passengers in said auto as to drive said auto into the rear of a parked truck which resulted in injury and death of a passenger sufficiently charges involuntary manslaughter within the meaning of this section and § 19-1411. *State v. Goldizen*, 58 Idaho 532, 76 P.2d 278 (1938).

Information complied with requirements of Code as to crime of involuntary manslaughter, when it charged defendant with driving a motor vehicle on a public highway at a designated time and place in a negligent and careless manner at an excessive rate of speed upon the wrong side of the highway while intoxicated so as to endanger lives of persons on the highway, and that he did unlawfully, wilfully, and feloniously drive his vehicle against a vehicle of another, and six designated persons were killed, and that defendant did wilfully, unlawfully, and feloniously, but without malice, kill said six persons, as information charged but one offense, and was sufficient to put defendant on trial on theory that he was either a principal or an accessory. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

An information alleging facts constituting both assault with a deadly weapon and assault with intent to commit murder and entitled "Assault With a Deadly Weapon With Intent to Murder" was sufficient to charge assault with intent to commit murder. *State v.*

Polson, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Informations.

These sections are made applicable to informations by § 19-1303. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Information, which charged defendant with committing lewd and lascivious acts committed on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and of said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under § 18-1508, to wit, lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Where information charged sale of liquor by defendant without a license the failure to allege that acts were done feloniously did not make information defective since § 23-938 under which information was filed expressly makes sale of liquor without a license a felony. *State v. Martin*, 73 Idaho 545, 255 P.2d 713 (1953).

Demurrer to information charging defendant with employing drugs and instruments with intention of producing an abortion was properly overruled where information substantially followed the wording of former § 18-601 in ordinary and concise language, and also alleged the particular circumstances of the offense charged. *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

An information charging respondent drove his automobile carelessly, heedlessly, without due caution and circumspection and in reckless disregard of the safety of others, and then setting forth a number of driving violations alleged to have been committed by respondent sufficiently charged respondent with acts constituting negligent homicide. *State v. Carpenter*, 85 Idaho 232, 378 P.2d 188 (1963).

While the unlawful acts asserted in the information are alleged in general terms, it is sufficient to advise a person of common understanding as to nature of the offense charged and adequately describe the offense with sufficient particularity to serve as a shield in the event of an attempted second prosecution for the same crime. *State v. McGlochlin*, 85 Idaho 459, 381 P.2d 435 (1963).

An information or indictment for sale of liquor without a license should allege the name of the purchaser of the liquor in order that a defendant may know which specific series of acts is the one culminating in the criminal charge, the information, and conviction.

tion and in order to describe the offense with sufficient particularity that it can be used as a shield in case of a second prosecution for the same offense. *State v. Grady*, 89 Idaho 204, 404 P.2d 347 (1965).

In a burglary prosecution since the trial court's allowing the prosecution to amend the information adding the words "in the nighttime" did not add or change the offense and the accused was neither surprised nor prejudiced by such amendment, the court did not err. *State v. Ranstrom*, 94 Idaho 348, 487 P.2d 942 (1971).

This statute, which governs the sufficiency of an indictment, is also applicable to information in its requirement that the appellant be adequately informed of the specific act and nature of the charge against him. *State v. Shannon*, 95 Idaho 299, 507 P.2d 808 (1973).

Information which stated that one horned, brindle, heifer cow being the property of Jeannine Martin was allegedly stolen by defendant between the middle of October, 1974, and the end of February, 1975, was sufficient to adequately set out the nature and circumstances of the offense charged and gave a sufficient description of the animal alleged to have been taken so as to enable a person of ordinary understanding to adequately know the details of the crime the state charged and intended to prove at the trial. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

In view of the jury instructions given, which adequately apprised the jury of the elements that must be proved in order to convict for rape, the Court of Appeals concluded that the inclusion of "fear" and "fearful" language in the information, which did not relate to elements of the crime, was harmless. *State v. Headlee*, 121 Idaho 979, 829 P.2d 869 (Ct. App. 1992).

Defendant failed to show that a lack of greater specificity in the dates of lewd acts in an information somehow inhibited his ability to defend against the charges of lewd conduct with a minor child under 16, or subjected him to the risk of another prosecution for the same offenses where the State could not have pleaded the charges with any greater particularity; the victim was young, between 8 and 10 years old, at the time these lewd acts were alleged to have been committed, she frequently visited defendant, her grandfather, at his home, where the abuse was alleged to have occurred and it was unrealistic to have expected her to have been able to have recalled dates specifically given her age and the time span over which the acts were alleged to have occurred. *State v. Jones*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 103 (Ct. App. Oct. 8, 2003).

In General.

Neither preliminary hearing, arrest, commitment or presentment are necessary prerequisites to indictment, and the attempt to distinguish between an indictment and a presentment, whatever its force might otherwise be, has no bearing on the validity of the indictment herein. *State v. Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

A complaint for reckless driving filed in a justice of the peace court was not subject to the requirements of this section. *State v. Pruett*, 91 Idaho 537, 428 P.2d 43 (1967).

Jurisdiction.

Motion in arrest of judgment based on ground that information failed to state that crime was committed in county in which filed, or in state of Idaho was proper, since district court did not have jurisdiction. *State v. Slater*, 71 Idaho 335, 231 P.2d 424 (1951).

Order of Statement Immaterial.

Order in which the matters required by this section appear in indictment is immaterial, and "conclusions" may be construed with the charging part in order to sustain indictment. *Territory v. Evans*, 2 Idaho (Hasb.) 425, 17 P. 139 (1888).

Perjury.

Indictment for perjury which charges defendant merely with denying, in the district court, that he made some contradictory statement before the grand jury, not stating the issue under investigation there nor the testimony taken nor whether it was true or false, violates this section. *State v. Lowe*, 60 Idaho 98, 88 P.2d 502 (1939).

Robbery.

A charge that an accused took money from the person, or from the immediate presence of the person, and that it was taken against his will and by means of force or fear, constituted the single charge of robbery and such a charge afforded the accused proper means by which to prepare a defense of the particular crime charged. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

Sufficiency in General.

The code has provided for the same liberality in pleadings and construction thereof in criminal cases as in civil cases, and if substantial facts necessary to constitute crime appear in indictment it will be held sufficient. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905).

Under this and the following sections an indictment or information which charges accused with some crime known to the statute, committed on or about a specified date, and alleges that the unlawful act was done willfully, unlawfully, and feloniously, and indicates particular crime charged, with time, place, circumstances, and conditions of same

is sufficient. *State v. Steers*, 12 Idaho 174, 85 P. 104 (1906).

Indictment is sufficient if it describes offense in language of the statute by which it is created or defined and the words employed make the charge clear to the common understanding. All that is necessary is that on its face, it is sufficient to advise defendant of the nature of the charge against him, and that it describes offense with such particularity as to serve as a shield in case of a second prosecution for same offense. *State v. O'Neil*, 24 Idaho 582, 135 P. 60 (1913); *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916); *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916); *State v. Rogers*, 30 Idaho 259, 163 P. 912 (1917); *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

Only test is not that information follows language of statute but that it is in compliance with law prescribing requisites of information. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Information for receiving stolen property is sufficient if it charges offense as defined by the code or in language of equivalent import. *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930).

An accused is entitled to know for what offense he is being charged. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Where the information filed in an aggravated assault prosecution contained a plain, concise, and definite statement of the essential facts constituting the offense charged, the failure of the information to list the precise subsections of the statutes that the defendant was alleged to have violated did not render the information legally insufficient. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

A legally sufficient information is a plain, concise, and definite written statement of the essential facts constituting the offense charged. *State v. Darbin*, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

The information must be specific so that the defendant may prepare a proper defense and protect himself against subsequent prosecution based on the same conduct. *State v. Darbin*, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

The sufficiency of an information ultimately depends on whether it fulfills the basic functions of the pleading instrument. Under this functional analysis, it must be determined first, whether the information contains the elements of the offense charged and fairly

informs the defendant of the charges against which he must defend, and second, whether it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *State v. Robran*, 119 Idaho 285, 805 P.2d 491 (Ct. App. 1991).

Allegations of an information, of lewd conduct with a minor child under 16, though general, were sufficient where defendant was fully apprised of the acts he was charged with committing at the preliminary hearing where the State presented the victims' testimony about the surrounding circumstances and the manner in which the offenses were alleged to have been committed. *State v. Jones*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 103 (Ct. App. Oct. 8, 2003).

Waiver.

Where defendant contended on appeal that the information failed to meet the requirements of § 19-1411 and this section, his failure to challenge the sufficiency of the information by demurrer constituted a waiver of any objection to the information on these grounds. *State v. Segovia*, 93 Idaho 594, 468 P.2d 660 (1970).

Collateral References. Sufficiency of indictment as affected by bill of particulars. 10 A.L.R. 982.

Theft of property, or receiving stolen property, belonging to different persons. 18 A.L.R. 1077.

Automobile, driving, while intoxicated. 42 A.L.R. 1513; 49 A.L.R. 1400; 68 A.L.R. 1374.

Necessity of alleging prior conviction in indictment to subject accused to increased punishment for subsequent offense. 58 A.L.R. 64; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Materiality of false statement, sufficiency of general averment as to. 80 A.L.R. 1443.

Bank officer's offense of making false statement or report as to assets or condition of bank, indictment for. 85 A.L.R. 834.

Blue Sky Laws. 87 A.L.R. 42.

Automobile, indictment for assault in connection with. 99 A.L.R. 837.

Value of property intended to be stolen, which would make its theft a felony, necessity and sufficiency of allegation as to, in indictment for burglary. 113 A.L.R. 1269.

Automobile, sufficiency of charging in words of statute offense relating to operation of. 115 A.L.R. 357.

Necessity of alleging specific facts or means in charging one as accessory before or after the fact. 116 A.L.R. 1104.

Farm products, complaint or information in prosecution for violation of statute regulating and licensing purchase of, for resale. 117 A.L.R. 364.

Naming offense covered by allegations of specific facts, error in. 121 A.L.R. 1088.

Real property or things savoring of real property, indictment for larceny of. 131 A.L.R. 146.

Cemeteries, burial lots, tombstones and the like, sufficiency of indictment under criminal statute specifically denouncing offenses affecting. 132 A.L.R. 565.

Barratry, indictment or information in prosecution for. 139 A.L.R. 625.

Burden of averment as to exception in criminal statute on which the prosecution is based. 153 A.L.R. 1218.

"And/or," use of, in indictment. 154 A.L.R. 872.

Necessity of alleging in information or indictment that act was "unlawful." 169 A.L.R. 166.

Naming owner of building in indictment or information for burglary, necessity of. 169 A.L.R. 887.

Homicide, necessity and materiality of statement of place of death in indictment or affidavit charging. 59 A.L.R.2d 901.

19-1410. Form of indictment. — It may be substantially in the following form:

The state of Idaho against A.B., in the district court of the judicial district, in the county of term,

A.B. is accused by the grand jury of the county of by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like), committed as follows:

The said A.B., on the day of, at the county of, (here set forth the act or omission charged as an offense).

[Cr. Prac. 1864, § 234; R.S., R.C., & C.L., § 7678; C.S., § 8826; I.C.A., § 19-1310; am. 2002, ch. 32, § 3, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 2 and 4 of S.L. 2002, ch. 32, are compiled as §§ 19-507 and 19-1506, respectively.

Sec. to sec. ref. This section is referred to in § 19-1703.

Cited in: State v. Webb, 6 Idaho 428, 55 P. 892 (1899); State v. Rathbone, 8 Idaho 161, 67 P. 186 (1898); State v. Shuff, 9 Idaho 115, 72 P. 664 (1903); State v. Adams, 9 Idaho 582, 75 P. 258 (1904); State v. Rooke, 10 Idaho 388, 79 P. 82 (1904); State v. Sly, 11 Idaho 110, 80 P. 1125 (1905); State v. Wetter, 11 Idaho 433, 83 P. 341 (1905); State v. Swensen, 13 Idaho 1, 81 P. 379 (1905); State v. Steers, 12 Idaho 174, 85 P. 104 (1906); State v. Neil, 13 Idaho 539, 90 P. 860, 91 P. 318 (1907); In re Dawson, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911); State v. Smith, 25 Idaho 541, 138 P. 1107 (1914); State v. Mickey, 27 Idaho 626, 150 P. 39 (1915); State v. Lundhigh, 30 Idaho 365, 164 P. 690 (1917); State v. Dingman, 37 Idaho 253, 219 P. 760 (1923); State v. Arnold, 39 Idaho 589, 229 P. 748 (1927); State v. Peters, 43 Idaho 564, 253 P. 842 (1927); State v. George, 44 Idaho 173, 258 P. 551 (1927); State v. Gee, 48 Idaho 688, 284 P. 845 (1930); State v. Griffith, 55 Idaho 60, 37 P.2d 402 (1934); State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937);

State v. Vanek, 59 Idaho 514, 84 P.2d 567 (1938); State v. Barr, 63 Idaho 59, 117 P.2d 282 (1941); State v. Calkins, 63 Idaho 314, 120 P.2d 253 (1941); State v. Burwell, 63 Idaho 373, 181 P.2d 197 (1941); State v. McKeenan, 91 Idaho 808, 430 P.2d 886 (1967).

ANALYSIS

Application of section.
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Application of Section.

The pleading requirements of §§ 19-1409, 19-1411 and this section are in conflict with § 19-3901. The first three apply to indictments and informations before the district court, whereas the last statute is applicable to criminal complaints in probate courts, justice of the peace, and police courts. The language of the statutes, although not identical, has the same substantive requirements. A conviction of an offense pleaded with the particularity required of the latter, could be pleaded as a bar to another charge for the same offense. State v. Henry, 83 Idaho 167, 359 P.2d 514 (1961).

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An information charging unlawful sale of intoxicating liquors which concludes with the clause, "Contrary to the form, force, and effect of the statutes in such cases made and provided and against the peace and dignity of the state of Idaho," is a sufficient allegation that liquor was sold or disposed of contrary to law,

whether it be the local option law or any other public statute. *State v. Schmitz*, 19 Idaho 566, 114 P. 1 (1911).

An information may properly have four parts: (1) caption, (2) inducement or commencement, (3) charging part, and (4) conclusion. *State v. Flower*, 27 Idaho 223, 147 P. 786 (1915).

Motion in arrest of judgment based on ground that information failed to state that crime was committed in county in which filed, or in state of Idaho was proper, since district court did not have jurisdiction. *State v. Slater*, 71 Idaho 335, 231 P.2d 424 (1951).

Where information charged sale of liquor by defendant without a license the failure to allege that acts were done feloniously did not make information defective since the § 23-

938 under which information was filed expressly makes sale of liquor without a license a felony. *State v. Martin*, 73 Idaho 545, 255 P.2d 713 (1953).

Collateral References. Necessity and sufficiency of signature to indictment. 30 A.L.R. 700.

Automobile, necessity for indictment in prosecution for driving while intoxicated. 68 A.L.R. 1374.

Statutes regarding form of indictment as violation of constitutional requirement of indictment. 69 A.L.R. 1392.

Jurat or certificate of officer, necessity and sufficiency of. 116 A.L.R. 589.

Waiver, right under statute or otherwise to waive indictment. 56 A.L.R.2d 837.

19-1411. Certainty required of indictment. — It must be direct and certain as it regards:

1. The party charged.
2. The offense charged.
3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense. [Cr. Prac. 1864, § 235; R.S., R.C., & C.L., § 7679; C.S., § 8827; I.C.A., § 19-1311.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Complaint, information or indictment need not negate statutory defenses to certain offenses, § 19-1433.

Sec. to sec. ref. This section is referred to in § 19-1703.

Cited in: *State v. Webb*, 6 Idaho 428, 55 P. 892 (1899); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Adams*, 9 Idaho 582, 75 P. 258 (1904); *State v. Wetter*, 11 Idaho 433, 83 P. 341 (1905); *In re Moyer*, 12 Idaho 250, 85 P. 897, 12 L.R.A. (n.s.) 227 (1906); *In re Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911); *State v. O'Neil*, 24 Idaho 582, 135 P. 60 (1913); *State v. Smith*, 25 Idaho 541, 138 P. 1107 (1914); *State v. Drury*, 25 Idaho 787, 139 P. 1129 (1914); *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915); *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917); *State v. Dingman*, 37 Idaho 253, 219 P. 760 (1923); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930); *State v. Griffith*, 55 Idaho 60, 37 P.2d 402 (1934); *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934); *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938); *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *Carey v. State*, 91 Idaho 706,

429 P.2d 836 (1967); *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968); *State v. Hahn*, 92 Idaho 265, 441 P.2d 714 (1968); *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982); *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989).

ANALYSIS

Application.
Burglary.
Demurrer for uncertainty.
Embezzlement.
Homicide.
Language of statute.
Larceny.
Offense charged.
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Sufficiency.
Waiver.

Application.

The pleading requirements of §§ 19-1409, 19-1410 and this section are in conflict with § 19-3901. The first three apply to indictments and informations before the district court, whereas the last statute is applicable to criminal complaints in probate courts, justice of the peace, and police courts. The language of the statutes, although not identical, has the same substantive requirements. A conviction of an offense pleaded with the particularity required of the latter, could be pleaded as a bar to another charge for the same offense.

State v. Henry, 83 Idaho 167, 359 P.2d 514 (1961).

Burglary.

An information for burglary which did not charge whether offense was committed in the daytime or the nighttime charged the offense of second degree burglary, and a special demurrer based on the ground that the charge did not state whether offense was committed in the daytime or the nighttime should not have been sustained. State v. Eubanks, 77 Idaho 439, 294 P.2d 273 (1956).

In a burglary prosecution since the trial court's allowing the prosecution to amend the information adding the words "in the nighttime" did not add or change the offense and the accused was neither surprised nor prejudiced by such amendment, the court did not err. State v. Ranstrom, 94 Idaho 348, 487 P.2d 942 (1971).

Demurrer for Uncertainty.

Special demurrer for uncertainty should point out particulars in which it is claimed the information is insufficient. State v. Peters, 43 Idaho 564, 253 P. 842 (1927).

Embezzlement.

Information charging sheriff with wilfully, unlawfully, fraudulently, and feloniously appropriating to his own use certain moneys paid to him in his official capacity sufficiently charges offense of embezzlement. State v. Steers, 12 Idaho 174, 85 P. 104 (1906).

In charging series of acts as single continuing offense of embezzlement, it is not necessary to allege that the series of acts was systematically instituted and carried on, or that the specific separate peculations can not be identified. State v. Peters, 43 Idaho 564, 253 P. 842 (1927).

An information charging manslaughter by wilfully and feloniously killing a human being without stating acts relied on to constitute the manslaughter is insufficient. State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937).

Homicide.

An information charging involuntary manslaughter by unlawfully and feloniously operating motor vehicle without due care and at a rate of speed in such a manner as to endanger lives and limbs of persons riding within the automobile which struck the rear of a truck causing the death of a guest in the automobile, was sufficient on demurrer. State v. Goldizen, 58 Idaho 532, 76 P.2d 278 (1938).

A murder information, charging that the defendant made an assault on a named woman inflicting mortal wounds on and in her body, and unlawfully, wilfully, feloniously, and with malice aforethought killed and murdered her, was fatally defective as not stating the acts constituting the offense and not

charging in which, or the means by which, the alleged crime was committed. State v. Calkins, 63 Idaho 314, 120 P.2d 253 (1941).

A defendant, before being placed on trial, is entitled to be appraised by the information not only of the name of the offense charged, but, in general terms of the manner in which he is charged with having committed such an offense. State v. Calkins, 63 Idaho 314, 120 P.2d 253 (1941).

If the means by and manner in which an alleged crime was committed, were unknown to the prosecutor, he must so allege in the information or in an amendment thereof. State v. Calkins, 63 Idaho 314, 120 P.2d 253 (1941).

Information was not subject to dismissal on ground of uncertainty where it alleged that defendant at designated place in county and state while under the influence of intoxicating liquor carelessly, negligently, recklessly and without due caution and wilfully, unlawfully, feloniously, but without malice drove automobile across highway at high speed without warning against body of a human being with great force producing injuries upon body of designated person from which he died, and thereby committed manslaughter. State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951).

Language of Statute.

In order that an information charging a statutory offense in the language of the statute may be sufficient, it must fully, directly and expressly contain all elements constituting the offense, and if the language of the statute fails to do this, such language may be expanded in the information, consonant with its intent, to sufficiently describe the crime. State v. Bowman, 40 Idaho 470, 235 P. 577 (1925).

The accused has a right to be informed, not only by the law, but by the indictment or information as well, of what acts and conduct are prohibited and made punishable, and of what acts or conduct he is called upon to answer for. State v. Burns, 53 Idaho 418, 23 P.2d 731 (1933).

Information, which charged defendant with committing lewd and lascivious acts committed on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and of said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under § 18-1508, to wit, lewd and lascivious conduct. State v. Petty, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

There was no prejudice to a defendant charged with aggravated battery in an infor-

mation that failed to describe the exact nature of the injuries inflicted and stated only that they were grievous in the terms of the statute defining such offense. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Larceny.

Information charging that at a time and place specified, defendant "did then and there feloniously steal, take and drive away two mares, the personal property of another," held sufficient. *State v. Rathbone*, 8 Idaho 161, 67 P. 186 (1901).

Information that charges larceny of one horse is not repugnant to this section for want of sufficient description. *State v. Collett*, 9 Idaho 608, 75 P. 271 (1904).

Information charging the unlawful and felonious taking of property from the possession of owner, naming him, giving a description of property, and fixing time and venue, is sufficient on demurrer. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Offense Charged.

Information in prosecution for murder held to sufficiently allege that death of deceased ensued and the means by which homicide was perpetrated. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905).

An information which charges that defendant "did wilfully, unlawfully, feloniously, and falsely forge and utter a bank check," and "did then and there utter the said bank check as true and genuine with intent to defraud the said R.," is fatally defective in that part charging the making of instrument fails to allege the same was done "with intent to defraud another," and in that the part charging the uttering of the bank check fails to allege that it was uttered "knowing the same to be false, altered, forged or counterfeited." *State v. Swensen*, 13 Idaho 1, 81 P. 379 (1905).

Information charging the crime of assault with intent to commit rape, which alleges that defendant did assault prosecutrix with intent to have sexual intercourse with her "wilfully, feloniously, violently, unlawfully, and against her will, wish, consent and resistance," sufficiently alleges intent to accomplish the felonious act by force and violence. *State v. Neil*, 13 Idaho 539, 90 P. 860, 91 P. 318 (1907).

Information charging robbery, in that defendant "did then and there and by means of said fear inspired in the said Efton Carr, as aforesaid, wilfully, unlawfully and feloniously take, steal and carry away from the person of said Efton Carr, and against the will of him, the said Efton Carr, certain personal property then and there being in the possession of and on the person of said Efton Carr, to wit *," is sufficient. *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912).

Information which charges offense of presenting for payment certain false claims, to

wit, bonds, and refers to the bonds as false and fraudulent, but states in detail facts showing that the offense really consists in presenting for payment genuine bonds as the basis of a false claim, will support conviction of latter offense. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Information charging that at time and place specified, defendant "then and there being, did assault with intent to kill one Parker Gundo, he the said defendant having the present ability to do so, by then and there, striking, hitting and beating said Parker Gundo with a heavy stick or club, did not charge assault with intent to commit murder by means of a deadly weapon or instrument, or by any means or force likely to produce great bodily injury. *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

Information charging interference with headgate regulated by watermaster held sufficient. *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

Information for receiving stolen goods need not allege that defendant received the stolen property both for his own gain and to prevent owner from again possessing his property. *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930).

An accused is entitled to know for what offense he is being charged. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

An information or indictment for sale of liquor without a license should allege the name of the purchaser of the liquor in order that the defendant may know which specific series of acts is the one culminating in the criminal charge, information, and conviction and in order to describe the offense with sufficient particularity that it can be used as a shield in case of a second prosecution for the same offense. *State v. Grady*, 89 Idaho 204, 404 P.2d 347 (1965).

Party Charged.

An information containing name of defendant in the caption, but not in the charging part, is insufficient to charge such person with a crime. *State v. Flower*, 27 Idaho 223, 147 P. 786 (1915).

Robbery.

A charge that an accused took money from the person, or from the immediate presence of the person, and that it was taken against his will and by means of force or fear, constituted the single charge of robbery, and such a charge afforded the accused proper means by which to prepare a defense of the particular crime charged. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

Sufficiency.

Information is not sufficient which states facts inferentially. They must be clearly and distinctly stated. *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

Where there are several ways of violating the statute specified, indictment may, in single count, charge commission of offense in any or all of ways specified, if different acts are not repugnant and constitute component parts of one transaction. *State v. Brown*, 36 Idaho 272, 211 P. 60 (1922); *State v. Alvord*, 46 Idaho 765, 271 P. 322 (1928).

Indictment or information should state facts and not legal conclusions. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Accused is entitled to statement of facts relied upon, and if these are not contained in statute denouncing offense they must be supplemented by pleader in drawing indictment or information. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Doing and causing thing to be done are same in law; therefore count is not double which charges both. *State v. Alvord*, 46 Idaho 765, 271 P. 322 (1928).

Information charging defendant with operating a motor vehicle on the public highway and that he did wilfully, unlawfully, negligently, recklessly and in a careless manner and while under influence of intoxicating liquor and without caution or circumspection in regard for the safety of others, drive his automobile across the center line of said highway and on the left side of the road in the front of another automobile and that a passenger as a result received mortal wounds and injuries and in such manner such defendant did in reckless disregard for the safety of others, but without malice, kill decedent, charged one offense and was sufficient. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

An information alleging facts constituting both assault with a deadly weapon and assault with intent to commit murder and enti-

tled "Assault With a Deadly Weapon With Intent to Murder" was sufficient to charge both offenses and defendant was not prejudiced by the failure to separately name the two offenses. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Informations must be specific in their content for two reasons: so the accused has a means to prepare a proper defense and so a defendant can protect himself against subsequent prosecution based on the commission of the same act. *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978).

An information or indictment which does not specifically list the property the defendant was charged with taking, fails to meet the statutory and constitutional requirements of specificity. *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978).

Information which stated that one horned, brindle, heifer cow being the property of Jeannine Martin was allegedly stolen by defendant between the middle of October, 1974, and the end of February, 1975, was sufficient to adequately set out the nature and circumstances of the offense charged and gave a sufficient description of the animal alleged to have been taken so as to enable a person of ordinary understanding to adequately know the details of the crime the state charged and intended to prove at the trial. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Waiver.

Where defendant contended on appeal that the information failed to meet the requirements of § 19-1409 and this section, his failure to challenge the sufficiency of the information by demurrer constituted a waiver of any objection to the information on these grounds. *State v. Segovia*, 93 Idaho 594, 468 P.2d 660 (1970).

Collateral References. "And/or," use of, in indictment. 118 A.L.R. 1375; 154 A.L.R. 866.

19-1412. Indictment by fictitious name. — When a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment. [Cr. Prac. 1864, § 236; R.S., R.C., & C.L., § 7680; C.S., § 8828; I.C.A., § 19-1312.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

In General.

Where complaint was filed before magistrate charging defendant in the name of Louis Trespi, and such defendant was committed under the name of Uterspi, and an information was filed in district court by prosecuting attorney charging said defendant with the

same crime in the name of Luis Yturaspe, and upon arraignment in district court, as provided by law, he answered that Luis Yturaspe was his correct name, and it appears from the record that the person against whom the information was filed is the same person who was examined before committing magistrate and committed, and that offense was the same, information should not be quashed on

ground that defendant never had a preliminary examination. *State v. Yturaspe*, 22 Idaho 360, 125 P. 802 (1912).

Collateral References. Substitution by mistake of name of person other than defendant for defendant's name. 79 A.L.R. 219.

Time and manner of raising objection of misnomer of defendant in indictment or information. 132 A.L.R. 410.

19-1413. Single offense to be charged. [Repealed.]

Compiler's notes. This section, which comprised Cr. Prac. 1864, § 237; R.S., R.C., & C.L., § 7681; C.S., § 8829; I.C.A., § 19-1313,

was repealed by S.L. 1963, ch. 159, § 1, effective March 19, 1963.

19-1414. Allegation as to time. — The precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense. [Cr. Prac. 1864, § 238; R.S., R.C., & C.L., § 7682; C.S., § 8830; I.C.A., § 19-1314.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

ANALYSIS

Alibi defense.

Child sexual abuse cases.

Complaints.

In general.

Lewd conduct with minor.

Sufficiency of information.

Alibi Defense.

Assertion of an alibi defense does not necessarily make time of the offense a material element which must be proven by the state. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

Child Sexual Abuse Cases.

In child sexual abuse cases involving a continuous course of sexual abuse, and evidence of frequent, secretive offenses over a period of time, credibility, not alibi, is the only issue, and detailed specificity in the information as to the times of the offenses is not required. *State v. Taylor*, 118 Idaho 450, 797 P.2d 158 (Ct. App. 1990).

Complaints.

Rule for stating time at which an offense was committed should be no more exacting for complaints in magistrates' courts than that

prescribed by this section for indictments. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

In General.

Where information alleged that burglary was committed on or about the second day of June and the proof was that it was committed some time before midnight on June first, such evidence was not fatal since it is sufficient if proof show the commission of crime at any time prior to filing of information and within statute of limitations. *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

While it would be easier for defendants if the state alleged the specific date and hour it expected to prove the burglary alleged to have been committed, based upon the information at hand before the complaint was filed, the law does not require the precise time to be given. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

Lewd Conduct with Minor.

Since time is not a material ingredient in the offense of lewd and lascivious conduct with a minor, the information need only be specific enough to enable the defendant to prepare his defense and to protect him from being subsequently prosecuted for the same offense. *State v. Roberts*, 101 Idaho 199, 610 P.2d 558 (1980).

Sufficiency of Information.

Where information charged that larceny occurred during a four and one-half months period, where the time of the offense was not a material element in the larceny charge and where the nature of the offense, taking an ambulatory stock animal from pasture, was such that exact date of taking would not likely

have been discovered absent a confession by the guilty party, the information filed against defendant was adequate since an information need not contain the precise time at which the crime was committed when time is not a material element of the crime charged. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Where counts I-III of the information stated that the alleged offenses of lewd and lascivious conduct with a child under the age of 16 occurred "on or about the months between June and September, 1976," counts IV and V stated that the alleged offenses occurred "on or about the months of May, 1976," and "of June, 1976," respectively, and where defendant never suggested any defense of alibi at trial, all of the counts were set forth with sufficient specificity to allow him to prepare his defense and to protect him from double jeopardy. *State v. Roberts*, 101 Idaho 199, 610 P.2d 558 (1980).

Because time is not a material element of the offense of lewd and lascivious conduct with a minor, because child abuse cases involve evidence of a number of secretive offenses over a period of time, and because an information need only be specific enough to enable a defendant to prepare a defense, apprise him of the statute violated and protect him from subsequent prosecution for the same offense, the information charging defendant with lewd and lascivious act or acts with each of his two daughters, between 1976 and 1979, at which time his daughters were minors, was sufficiently specific as to time and not flawed. *State v. Coleman*, 128 Idaho 466, 915 P.2d 28 (Ct. App. 1996).

Collateral References. Perjury, date of proceeding in which committed. 24 A.L.R. 1143.

Limitation period, necessity of alleging facts relied upon to avoid effect of lapse of. 52 A.L.R.3d 922.

19-1415. Erroneous designation of person injured. — When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material. [Cr. Prac. 1864, § 239; R.S., R.C., & C.L., § 7683; C.S., § 8831; I.C.A., § 19-1315.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Allegation of ownership.

Application.

Proof limited.

Variance.

Allegation of Ownership.

An information alleging C. to be the owner of the stolen property is supported by proof showing that he was in possession of the property as agent of the real owner with full power to sell or otherwise dispose of the same. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Information charging larceny of two mares from G. M. B. was supported by proof that the mares were the property of G. M. B. and R. L. B. *State v. Rathbone*, 8 Idaho 161, 67 P. 186 (1901).

An information for larceny which alleges title to thing stolen to be in B is supported by proof of property in the firm of B. & J. *State v. Ireland*, 9 Idaho 686, 75 P. 257 (1904).

Failure to allege ownership of burglarized building is not fatal defect. *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929).

Ownership of stolen property need not be alleged with precision where the alleged crime caused an injury to another. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

An indictment for larceny which alleges title to the articles stolen to be in P. I. Company is sufficient without alleging that the Company is a corporation or a partnership or an entity capable of owning title to property. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

Application.

This section is applicable to burglary offense. *State v. Love*, 76 Idaho 378, 283 P.2d 925 (1955).

Defendant in trial on information for burglary was not misled as to premises he was charged with burglarizing by introduction into evidence of pasteboard box he was carrying containing merchandise from "golf shop" conducted by professional golfer on premises described in information as "being in the possession of and occupied by the Pocatello Golf and Country Club, Inc.," where entry had been made from the patio into both the "bar-room" where defendant took some liquor, and

into the "golf shop" where the defendant had taken merchandise. *State v. Love*, 76 Idaho 378, 283 P.2d 925 (1955).

Proof Limited.

When the information names the person intended to be defrauded the prosecution is confined, in its proof of intent to defraud, to the person named. *State v. McDermott*, 52 Idaho 602, 17 P.2d 343 (1932).

Variance.

Fact that information charges murder to have been committed on one whose true name is unknown while the evidence showed killing of a person of known name, is not a fatal variance. *State v. St. Clair*, 6 Idaho 109, 53 P. 1 (1898).

19-1416. Construction of words. — The words used in an indictment are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning. [Cr. Prac. 1864, § 240; R.S., R.C., & C.L., § 7684; C.S., § 8832; I.C.A., § 19-1316.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989).

ANALYSIS

Bigamy.
Fear and fearful.
Intoxicants.

Bigamy.

The word "bigamy" need not be defined in indictment. *United States v. Kuntze*, 2 Idaho

Collateral References. Husband or wife, laying ownership of property in. 2 A.L.R. 352.

Joinder of counts for theft of property, or receiving stolen property, belonging to different persons. 18 A.L.R. 1077.

Necessity of naming owner of building in indictment or information for burglary. 20 A.L.R. 510; 169 A.L.R. 887.

Forgery of names of several individuals to the same instrument as more than one offense. 33 A.L.R. 562.

Employer's violation of statute regarding wages or hours, necessity in indictment for, of naming particular employees. 81 A.L.R. 76.

Incorporation or legal entity of owner of property not a natural person, necessity of alleging. 88 A.L.R. 485.

(Hasb.) 480, 21 P. 407 (1889).

Fear and Fearful.

In view of the jury instructions given, which adequately apprised the jury of the elements that must be proved in order to convict for rape, the Court of Appeals concluded that the inclusion of "fear" and "fearful" language in the information, which did not relate to elements of the crime, was harmless. *State v. Headlee*, 121 Idaho 979, 829 P.2d 869 (Ct. App. 1992).

Intoxicants.

Word "drink" in ordinary sense means use of liquid as beverage to slake thirst which may be thirst for intoxicants. *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

19-1417. Words of statute. — Words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used. [Cr. Prac. 1864, § 241; R.S., R.C., & C.L., § 7685; C.S., § 8833; I.C.A., § 19-1317.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912); *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915); *State v. Emory*, 55 Idaho 649, 46

P.2d 67 (1935); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941); *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989).

Sufficiency of Statutory Language.

In order that an information charging a statutory offense in the language of the statute may be sufficient, it must fully, directly and expressly contain all elements constituting the offense, and if the language of the

statute fails to do this, such language may be expanded in the information, consonant with its intent, to sufficiently describe the crime.

State v. Bowman, 40 Idaho 470, 235 P. 577 (1925).

19-1418. Sufficiency of indictment. — The indictment is sufficient if it can be understood therefrom:

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That it was found by a grand jury of the county in which the court was held.

3. That the defendant is named, or, if his name cannot be discovered that he is described by a fictitious name, with a statement that his true name is to the jury unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein.

5. That the offense was committed at some time prior to the time of finding the indictment.

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case. [Cr. Prac. 1864, § 242; R.S., R.C., & C.L., § 7686; C.S., § 8834; I.C.A., § 19-1318.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Complaint, information or indictment need not negate statutory defenses to certain offenses, § 19-1433.

Cited in: *United States v. Kuntze*, 2 Idaho (Hasb.) 480, 21 P. 407 (1889); *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895); *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Neil*, 13 Idaho 539, 90 P. 860 (1907); *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917); *State v. Dingman*, 37 Idaho 253, 219 P. 760 (1923); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924); *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925); *State v. George*, 44 Idaho 173, 258 P. 551 (1927); *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930); *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960); *State v. Grady*, 89 Idaho 204, 404 P.2d 347

(1965); *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969); *State v. Shannon*, 95 Idaho 299, 507 P.2d 808 (1973); *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978); *State v. Denton*, 115 Idaho 402, 766 P.2d 1283 (Ct. App. 1989); *State v. Clark*, 115 Idaho 1056, 772 P.2d 263 (Ct. App. 1989); *State v. Headlee*, 121 Idaho 979, 829 P.2d 869 (Ct. App. 1992).

ANALYSIS

Homicide.
Larceny.
Omission of title.
Robbery.
Sufficiency in general.
Venue.

Homicide.

Failure of indictment for murder to allege the killing to have been done deliberately and premeditatedly is not fatal where it alleges the killing to have been done with malice aforethought. *People v. Ah Choy*, 1 Idaho 317 (1870).

Where acts or elements which constitute offense of involuntary manslaughter are sufficiently charged to enable a person of com-

mon understanding to know what is intended, the information is sufficient even though it fails to allege that defendant is charged with involuntary manslaughter, and makes the general charge of manslaughter. Facts alleged, rather than the designation of offense, control. *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915).

Larceny.

An information alleging C. to be the owner of the stolen property is supported by proof showing that he was in possession of the property as agent of the real owner with full power to sell or otherwise dispose of the same. *State v. Farris*, 5 Idaho 666, 51 P. 772 (1897).

Ownership of stolen property need not be alleged with precision where the alleged crime caused an injury to another. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

An indictment for larceny which alleges title to the articles stolen to be in P. I. Company is sufficient without alleging that the Company is a corporation or a partnership or an entity capable of owning title to property. *State v. Kenworthy*, 68 Idaho 312, 193 P.2d 838 (1948).

Omission of Title.

Failure of indictment to state title of action is not fatal. *People v. Walters*, 1 Idaho 271 (1869).

Robbery.

A charge that an accused took money from the person, or from the immediate presence of the person, and that it was taken against his will and by means of force or fear, constituted the single charge of robbery and such a charge afforded the accused proper means by which to prepare a defense of the particular crime charged. *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971).

Sufficiency in General.

While right to bill of particulars is not recognized by Idaho statutes, Supreme Court has held that defendant would be entitled to such bill in sound discretion of court. *State v. Rathbone*, 8 Idaho 161, 67 P. 186 (1901); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Where information appears to contain every element of offense intended to be charged, and sufficiently apprises defendant of what he must be prepared to meet, it is sufficient. *State v. Cosgrove*, 36 Idaho 278, 210 P. 393 (1922).

All that is necessary is that information be sufficient to advise defendant of nature of charge against him and that it describes offense with such particularity as to serve as shield in case of second prosecution for same

offense. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Information was not subject to dismissal on ground of uncertainty where it alleged that defendant at designated place in county and state while under the influence of intoxicating liquor carelessly, negligently, recklessly, and without, due caution and wilfully, unlawfully, feloniously, but without malice drove automobile across highway at high speed without warning against body of a human being with great force producing injuries upon body of designated person from which he died, and and thereby committed manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

An accused is entitled to know for what offense he is being charged. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Information, which charged defendant with committing lewd and lascivious acts committed on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under § 18-1508, to wit, lewd and lascivious conduct. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

An information for aggravated battery that alleged that the defendant assaulted the prosecuting witness with premeditated design, striking and beating him with his fists and kicking him and "thereby wounding and inflicting grievous bodily injury" upon him was sufficient to enable a person of ordinary understanding to know what was intended, i.e., that the injuries inflicted were in nature more serious than that which would result from a simple battery. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Information which stated that one horned, brindle, heifer cow being the property of Jeannine Martin was allegedly stolen by defendant between the middle of October, 1974, and the end of February, 1975, was sufficient to adequately set out the nature and circumstances of the offense charged and gave a sufficient description of the animal alleged to have been taken so as to enable a person of ordinary understanding to adequately know the details of the crime the state charged and intended to prove at the trial. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

The information included all of the elements of the offense and sufficiently informed defendant of those acts for which he was

accused, the pleading identified the substance that defendant was alleged to have possessed and the date and place of possession, and in the absence of any suggestion in the information that the state was charging defendant with possession of only a portion of the cocaine found on that date, defendant was on notice that he must be prepared to present a defense regarding all of the cocaine so found. *State v. Holcomb*, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995).

Venue.

Venue of offense must be laid in complaint, indictment, or information. *State v. Cole*, 31 Idaho 603, 174 P. 131 (1918).

Motion in arrest of judgment based on ground that information failed to state that

crime was committed in county in which filed, or in state of Idaho was proper, since district court did not have jurisdiction. *State v. Slater*, 71 Idaho 335, 231 P.2d 424 (1951).

Information which charged that crime was committed in town, county and state within jurisdiction of court held sufficient on motion to dismiss based on lack of venue. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Although none of the questions raised by defendant upon appeal was material, the Supreme Court reversed defendant's conviction where it appeared on the face of the record that the state had failed to plead the locus criminis in the information by which defendant was charged. *State v. Mowrey*, 91 Idaho 693, 429 P.2d 425 (1967).

19-1419. Defects of form. — No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant upon its merits. [Cr. Prac. 1864, § 243; R.S., R.C., & C.L., § 7687; C.S., § 8835; I.C.A., § 19-1319.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Formal defects in general disregarded, § 19-3702.

Cited in: *In re Marshall*, 6 Idaho 516, 56 P. 470 (1899); *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915); *State v. Andrus*, 29 Idaho 1, 156 P. 421 (1916); *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916); *State v. Poynter*, 34 Idaho 504, 205 P. 561 (1921); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930); *State v. Montgomery*, 48 Idaho 760, 285 P. 467 (1930); *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Calkins*, 63 Idaho 314, 120 P.2d 253 (1941); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960); *State v. Martinez*, 89 Idaho 232, 404 P.2d 573 (1965).

ANALYSIS

Clerical errors.

Construction.

Jurisdictional defects.

Substantial compliance.

Substantial rights of defendant.

Uncertainty.

Clerical Errors.

Indictment for libel is sustained under this section where it sets out the libelous matter in haec verba prefaced by the words, "that is to

say," although it did not use the technical phrase "to the tenor and effect following," or the "following words and figures." *Bonney v. State*, 3 Idaho 288, 29 P. 185 (1892).

Clerical error charging commission of the crime on November 15th, 1905, whereas the information was filed on March 15, 1905, is not fatal where it alleges that, prior to filing thereof, defendant had had a preliminary examination, and otherwise identifies the date intended to be charged as November 15, 1904. *State v. Roland*, 11 Idaho 490, 83 P. 337 (1905).

Construction.

Rule of liberal construction of indictments and informations has been adopted in this state. *State v. Caldwell*, 21 Idaho 663, 123 P. 299 (1912).

Jurisdictional Defects.

Failure to charge that intoxicating liquors were drunk "as a beverage" will not render information defective. *State v. Woodward*, 41 Idaho 353, 238 P. 525 (1925).

Even though a plea of guilty was entered by the appellant herein, that does not preclude him from raising jurisdictional defects in the information. *State v. Grady*, 89 Idaho 204, 404 P.2d 347 (1965).

Substantial Compliance.

Indictment was not invalid on the ground that there was no indorsement of true bill signed by foreman where words "true bill" were placed under title of court just before body of indictment and name of foreman with title appeared below body of indictment since

error if any was not prejudicial as there was a substantial compliance with the statute. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Substantial Rights of Defendant.

Amendment of the caption of an information alleging facts constituting aggravated battery by changing the designation of the offense charged from "Aggravated Assault" to "Aggravated Battery" did not prejudice any substantial right of the defendant or entitle him to a preliminary hearing on the amended information. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

An information alleging facts constituting both assault with a deadly weapon and assault with intent to commit murder and entitled "Assault With a Deadly Weapon With Intent to Murder" was sufficient to charge both offenses and defendant was not prejudiced by the failure to separately name the two offenses. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S.

977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Although the inclusion of the word "not" significantly changes the nature of the offense, it appeared that defendant was aware that the offense was a felony and amending the information did not prejudice him in preparing a defense. *State v. Darbin*, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

Uncertainty.

Information was not subject to dismissal on ground of uncertainty where it alleged that defendant at designated place in county and state while under the influence of intoxicating liquor carelessly, negligently, recklessly, and without due caution and wilfully, unlawfully, feloniously, but without malice drove automobile across highway at high speed without warning against body of a human being with great force producing injuries upon body of designated person from which he died, and thereby committed manslaughter. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

19-1420. Amendment of indictment. — An indictment or information may be amended by the prosecuting attorney without leave of the court, at any time before the defendant pleads, and at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An information or indictment cannot be amended so as to charge an offense other than that for which the defendant has been held to answer. [C.S., § 8835-A, as added by 1929, ch. 72, § 1, p. 110; I.C.A., § 19-1320.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Calkins*, 63 Idaho 314, 120 P.2d 253; *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961); *State v. Shannon*, 95 Idaho 299, 507 P.2d 808 (1973); *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978); *State v. Tribe*, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994); *State v. Schumacher*, 136 Idaho 509, 37 P.3d 6 (Ct. App. 2001).

ANALYSIS

In general.

Amendment after pleading.

Amendment injecting new issues.

Appeal.

Court's discretion.

County.

Designation of code section.

Dismissal.

False pretenses.

No prejudicial effect.

— Information.

Threat of enhanced sentence.

Waiver.

In General.

It was not error to permit the amendment of an information which charged acts constituting aggravated battery by changing the caption from "Aggravated Assault" to "Aggravated Battery." *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Amendment After Pleading.

The amendment by the trial court, striking from the information that the defendant was convicted of felony and sentenced to the penitentiary, after defendant had entered a plea to the information, was not an abuse of discretion, the question of the propriety of the amendment being addressed to the sound discretion of the trial court and no showing being made of prejudice of the defendant's rights by such order. *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963).

Amendment Injecting New Issues.

Complaint charging defendant, an Indian, with the crime of illegal possession of a deer

carcass during closed season, could not be amended in district court on appeal from probate court by alleging the taking and killing of the deer on privately owned lands, since the amendment injected new issues which were not tried in probate court. *State v. Powaukee*, 78 Idaho 257, 300 P.2d 488 (1956).

In a burglary prosecution since the trial court's allowing the prosecution to amend the information adding the words "in the nighttime" did not add or change the offense and the accused was neither surprised nor prejudiced by such amendment, the court did not err. *State v. Ranstrom*, 94 Idaho 348, 487 P.2d 942 (1971).

Appeal.

A demurrer by the defendant to an information for burglary that the information did not conform to requirements of § 19-1411 in that the information was not direct and certain as regards the offense charged, which demurrer was sustained, and judgment entered in the minutes, was a judgment from which the state could appeal where it indicated that it did not desire to amend. *State v. Eubanks*, 77 Idaho 439, 294 P.2d 273 (1956).

Court's Discretion.

Subsection (e) of I.C.R. 7 authorizes the amendment of an information any time before the prosecutor rests, as long as no new offense is charged and the defendant is not prejudiced; subject to those caveats, the determination of whether the prosecutor should be allowed to amend the information rests in the trial court's discretion. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

Where defendant received adequate notice of the charges, and an amendment charging him as a persistent violator was filed several weeks before trial, the trial judge did not abuse his discretion by allowing the amendment. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

County.

Where the indictment sets out clearly and in language easily understood the facts sufficient to establish the jurisdiction of the district court so that it was easily understood, both before and after the amendment, where the offense occurred, the court did not err in allowing the amendment of the indictment by the insertion of the words "Ada County" after the words "Boise County." *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970).

Designation of Code Section.

Where the indictment sets out clearly and in language easily understood the act or omission constituting the offense charged, so that it was easily understood, both before and after the amendment, what offense was

charged, the court did not err in permitting the amendment of the designation of the code section that the accused was charged of violating. *State v. Bullis*, 93 Idaho 749, 472 P.2d 315 (1970).

Dismissal.

Defendant was not entitled to have information dismissed under § 19-3501 on the grounds that the trial court had failed to grant him a speedy trial where a new information had been filed in the term succeeding the term in which the complaint was filed, such new information requiring a new arraignment and plea, and the defendant was not tried until the second following term. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

False Pretenses.

Where indictment for swindling charged accused with having "executed" a fictitious contract, an amendment charging that he "received" it, did not charge a new or different offense, where it otherwise charged him with having fabricated the contract. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

No Prejudicial Effect.

Where the defendant in a rape prosecution had been aware of the victim's age before the filing, one day prior to trial, of an amended information alleging statutory rape and he did not make a claim that he could have disputed her age, the defendant's rights were not prejudiced from the amendment, and therefore, there was no abuse of discretion. *State v. LaMere*, 103 Idaho 839, 655 P.2d 46 (1982).

—Information.

Where State presented evidence of two incidents of improper touching of the victim that were not the bases of the charges and were not described at the preliminary hearing, that did not amount to a fatal variance because the jury could not have used that evidence to convict defendant where that testimony was specifically admitted as evidence of other misconduct for purposes that were permissible under Idaho R. Evid. 404(b) and immediately after presentation of this evidence, the court gave the jurors a limiting instruction. *State v. Jones*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 103 (Ct. App. Oct. 8, 2003).

Threat of Enhanced Sentence.

The district court did not err when it concluded that defendant voluntarily pled guilty to a charge of aggravated assault upon a law enforcement officer where defendant entered his plea to avoid the prosecutor's threat of an enhanced sentence and where the prosecutor's threat was allegedly mentioned for the

first time during the hearing at which defendant was to enter his plea. *State v. Storm*, 123 Idaho 228, 846 P.2d 230 (Ct. App. 1993).

Waiver.

Where defendant pleaded guilty on second trial to information amended at first trial, information as amended having been read at second trial, any irregularity in the amendment was waived. *State v. Ward*, 51 Idaho 68, 1 P.2d 620 (1931).

Collateral References. Power of court to

amend indictment. 7 A.L.R. 1516; 68 A.L.R. 928.

Joinder in same indictment of defendant charged singly with one offense and codefendant charged jointly with him with another offense. 82 A.L.R. 484.

Unauthorized amendment, effect of. 101 A.L.R. 1254.

Finding or return of indictment, or filing of information, as tolling limitation period. 18 A.L.R.4th 1202.

19-1421. Presumptions and facts judicially noticed. — Neither presumptions of law nor matters of which judicial notice is taken, need be stated in an indictment. [Cr. Prac. 1864, § 244; R.S., R.C., & C.L., § 7688; C.S., § 8836; I.C.A., § 19-1321.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Official Records.

The date of the commencement of the prosecution for acting as a real estate salesman

without a license which was before the trial court was shown by its official record, thus was not an issuable fact to be tried in the case and since it was not a fact disputed by a plea of not guilty the allegation of the fact that the complaint was filed within the statutory time in the information would constitute pure surplusage. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

19-1422. Pleading judgments. — In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction, however, must be established on the trial. [Cr. Prac. 1864, § 245; R.S., R.C., & C.L., § 7689; C.S., § 8837; I.C.A., § 19-1322.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Proof.

One pleading judgment of inferior court must affirmatively prove jurisdiction of such court over subject matter. *State v. Dunn*, 44 Idaho 636, 258 P. 553 (1927).

19-1423. Pleading private statutes. — In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof. [Cr. Prac. 1864, § 246; R.S., R.C., & C.L., § 7690; C.S., § 8838; I.C.A., § 19-1323.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1424. Indictment for libel. — An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, or of the defamatory matter on which the indictment is founded; but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on the trial. [Cr. Prac. 1864, § 247; R.S., R.C., & C.L., § 7691; C.S., § 8839; I.C.A., § 19-1324.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1425. Misdescription of forged instrument. — When an instrument which is the subject of an indictment for forgery has been destroyed or withheld by the act or the procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. [Cr. Prac. 1864, § 248; R.S., R.C., & C.L., § 7692; C.S., § 8840; I.C.A., § 19-1325.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1426. Indictment for perjury. — In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed. [Cr. Prac. 1864, § 249; R.S., R.C., & C.L., § 7693; C.S., § 8841; I.C.A., § 19-1326.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Double jeopardy.

Informations.

Sufficiency of indictment or information.

Double Jeopardy.

This statute is equally applicable to an information filed by the prosecuting attorney under § 19-1301 et seq. *State v. Thomas*, 82 Idaho 473, 355 P.2d 674 (1960).

Defendants later prosecution for perjury committed during a prior trial at which he was convicted of exhibiting a deadly weapon did not constitute double jeopardy. *State v. Crawford*, 94 Idaho 463, 491 P.2d 180 (1971).

Informations.

This statute is equally applicable to an information for perjury. *State v. Crawford*, 94 Idaho 463, 491 P.2d 180 (1971).

Sufficiency of Indictment or Information.

Indictment charging defendant with perjury in denying statements made before the grand jury was insufficient, where indictment set forth case's title, docket number and court, but did not in any manner set forth what issue was, or nature of point in question.

State v. Lowe, 60 Idaho 98, 88 P.2d 502 (1939).

Information charging defendant with perjury in connection with his application for a marriage license was fatally defective and properly dismissed because it failed to name officer before whom oath was taken and did not allege authority of officer to administer the oath as required by this section, and did not allege that false statement was made in written affidavit sworn to before the county auditor as required by § 32-404. State v. Thomas, 82 Idaho 473, 355 P.2d 674 (1960).

While an indictment or information containing all the elements set out in this section

is sufficient, the section does not say that an indictment or information is insufficient if it does not specifically set forth the name of the identical person before whom the oath was taken. State v. Martinez, 89 Idaho 232, 404 P.2d 573 (1965).

An information for perjury does not have to allege the jurisdiction of the court before which the offense of perjury was allegedly committed. State v. Crawford, 94 Idaho 463, 491 P.2d 180 (1971).

Collateral References. Description in indictment for perjury of proceeding in which perjury was committed. 24 A.L.R. 1137.

19-1427. Indictment for larceny or embezzlement. — In an indictment for the larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [R.S., R.C., & C.L., § 7694; C.S., § 8842; I.C.A., § 19-1327.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1428. Indictment for selling obscene books. — An indictment for exhibiting, publishing, passing, selling, or offering to sell, or having in possession, with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, paper, or writing; but it is sufficient to state generally the fact of the lewdness or obscenity thereof. [R.S., R.C., & C.L., § 7695; C.S., § 8843; I.C.A., § 19-1328.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1429. Conviction or acquittal of several defendants. — Upon an indictment against several defendants, any one or more may be convicted or acquitted. [Cr. Prac. 1864, § 250; R.S., R.C., & C.L., § 7696; C.S., § 8844; I.C.A., § 19-1329.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Allen, 38 Idaho 168, 219 P. 1050 (1923).

Different Penalties.

In prosecution where court has discretion of sentencing to penitentiary as for felony or jail as for misdemeanor, the court, where there

are several defendants, may sentence part to penitentiary and part to jail. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

19-1430. Distinction between accessories and principals abolished. — The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal. [Cr. Prac. 1864, § 251; R.S., R.C., & C.L., § 7697; C.S., § 8845; I.C.A., § 19-1330.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Accessories defined, § 18-205. Principals defined, § 18-204.

Cited in: *State v. Cramer*, 20 Idaho 639, 119 P. 30 (1911); *State v. Curtis*, 30 Idaho 537, 165 P. 999 (1917); *State v. Nolan*, 31 Idaho 71, 169 P. 295 (1917); *State v. Chacon*, 36 Idaho 148, 209 P. 889 (1922); *State v. Bull*, 47 Idaho 336, 276 P. 528 (1929); *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929); *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932); *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. McCandless*, 70 Idaho 468, 222 P.2d 156 (1950); *Howard v. Felton*, 85 Idaho 286, 379 P.2d 414 (1963); *State v. Perez*, 99 Idaho 181, 579 P.2d 127 (1978).

ANALYSIS

Charge against accessory.

Double jeopardy.

Evidence.

Instructions.

Parties.

Proof.

Charge Against Accessory.

This section has so changed the rules of pleading that it is not necessary to charge an accessory before the fact as such. *People v. Ah Hop*, 1 Idaho 698; but an indictment charging an accessory as such is not bad. *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 P. 39 (1888).

Double Jeopardy.

Former double jeopardy statute, § 18-301 (repealed 1995), created no exception to imputed responsibility under this section; although a defendant may not receive multiple convictions or punishments for the same act,

he is responsible for all distinguishable acts, including those of others in concert with him. *State v. Sensenig*, 110 Idaho 83, 714 P.2d 52 (Ct. App. 1985).

Evidence.

Where evidence showed that defendants charged with robbery, attempted extortion from parties occupying a hotel room, attempted to get into the room, and followed up by taking money by force, jury was justified in assuming that defendants acted in concert. *State v. Robinson*, 71 Idaho 290, 230 P.2d 693 (1951).

In a trial of two defendants for robbery, there was no variance between the information drawn in conformity to this section, charging each of the defendants as principals, and evidence which failed to show which of the defendants actually took the property alleged to have been stolen. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

In a robbery prosecution where defendants denied acting in concert but where the evidence showed that two of the defendants took the victim's wallet while the other two defendants were beating victim, all four defendants were properly convicted of robbery despite defendants' contention that state did not prove elements of robbery as to each defendant. *State v. Gerhardt*, 97 Idaho 603, 549 P.2d 262 (1976).

Instructions.

Instruction that one who aids or abets in commission of a crime, though absent at time of its commission, shall be prosecuted, tried, and punished as a principal is erroneous, but is cured by other instructions to the effect that the jury must find from the evidence, beyond a reasonable doubt, that defendant acted knowingly, and with a guilty purpose and intent. This last instruction excludes a possibility of conviction because defendant innocently aided in the perpetration of a crime. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

It is not error to instruct jury in the language of this section. *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904).

Where trial judge indicated that there was sufficient evidence from which a theory of aiding and abetting could be derived even if the jury determined that another person did the shooting, the trial judge did not err in giving aiding and abetting instructions to the jury. *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

Parties.

Information, which charged defendant with commission of crime was not defective in that other participants were not named in information, if other participants were never apprehended or given a preliminary examination, since accused may be tried as either a principal or accessory. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

Defendant was properly charged and convicted as a principal for first degree murder though he may have left store a few seconds

ahead of co-defendant's shooting of proprietor where both defendants entered store for the purpose of committing armed robbery. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

All parties involved in the commission of a crime are principals and no reference to a defendant as an accessory is required; if an accused is fully advised of the acts he is charged with committing, he is presumed to know that he would be a principal and guilty as such whether he directly committed the acts charged or aided and abetted in their commission by another. *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985).

Proof.

Where information charged defendant as a principal, but proof showed that defendant was only an accessory, there was not a fatal variance. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

19-1431. Trial of accessories without principal. — An accessory to the commission of a felony may be indicted, tried, and punished, though the principal may be neither indicted nor tried. [Cr. Prac. 1864, § 252; R.S., R.C., & C.L., § 7698; C.S., § 8846; I.C.A., § 19-1331.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *In re Moyer*, 12 Idaho 250, 85 P. 897, 12 L.R.A. (n.s.) 227, 118 Am. St. R. 214 (1906).

Parties.

Information, which charged defendant with commission of crime was not defective in that other participants were not named in information, if other participants were never apprehended or given a preliminary examination, since accused may be tried as either a principal or accessory. *State v. So*, 71 Idaho 324, 231 P.2d 734 (1951).

19-1432. Charging two or more offenses in same indictment. — Two (2) or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan. [I.C., § 19-1432, as added by 1972, ch. 336, § 6, p. 844.]

Compiler's notes. Section 5 of S.L. 1972, ch. 336, is compiled as §§ 19-401 — 19-404 and § 7 is compiled as §§ 19-1717 — 19-1719.

Cited in: *State v. Jennings*, 95 Idaho 724, 518 P.2d 1186 (1974).

ANALYSIS

Multiplicity.

Same act or transaction.

Multiplicity.

The issue of multiplicity may arise in an information as well as an indictment. *Sanchez v. State*, 127 Idaho 709, 905 P.2d 642 (Ct. App. 1995).

In charging defendant of lewd conduct with a minor child under sixteen, a violation of Idaho Code § 18-1508, counts I and II using identical language, the State was not charging defendant twice for one single act, nor

were they charging him for a continuous course of conduct; rather, the State was charging defendant for two separate and distinct acts that occurred in the same manner and during the same span of time where the victim testified to two incidents of manual-genital touching that occurred within that time period. *State v. Jones*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 103 (Ct. App. Oct. 8, 2003).

Same Act or Transaction.

It was proper to charge murder in two counts in the same information and to try defendant for both of the alleged offenses before the same jury where both victims of the fatal shooting were found in the same apartment at the same time. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

19-1433. Unnecessary to negate statutory defenses in certain cases. — In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any of the provisions of chapters 22, 25, 27, 28, 29, 30, 31, 32, or 33, title 37, Idaho Code, it shall not be necessary to negate any exception, excuse, proviso, or exemption, contained in those chapters, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. [1970, ch. 186, § 1, p. 540.]

Compiler's notes. Chapters 22, 29, 30, 32 and 33 of title 37 were repealed.

Section 2 of S.L. 1970, ch. 186 declared an emergency. Approved March 13, 1970.

CHAPTER 15

ARRAIGNMENT

SECTION.

- 19-1501. Place of arraignment.
- 19-1502. Presence of defendant.
- 19-1503. Order for production of defendant.
- 19-1504. Issuance of bench warrant.
- 19-1505. Clerk to issue warrant.
- 19-1506. Form of bench warrant.
- 19-1507. Bail.
- 19-1508. Service of warrant.
- 19-1509. Proceedings on giving bail.

SECTION.

- 19-1510. Increasing bail.
- 19-1511. Commitment of defendant.
- 19-1512. Right to counsel.
- 19-1513. [Repealed.]
- 19-1514. Arraignment, how made.
- 19-1515. Question as to true name of defendant.
- 19-1516. Time allowed for answer.

19-1501. Place of arraignment. — When the indictment is filed, the defendant must be arraigned thereon before the court in which it is found. [Cr. Prac. 1864, § 254; R.S., R.C., & C.L., § 7710; C.S., § 8847; I.C.A., § 19-1401.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Arraignment on indictment or information, I.C.R. 10.

Sec. to sec. ref. This chapter is referred to in § 19-1406.

Cited in: *State v. Major*, 111 Idaho 410, 725 P.2d 115 (1986).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 591 — 594.

22 C.J.S., Criminal Law, §§ 357 — 363.

In general. 110 A.L.R. 1300.

Accused's right to assistance of counsel at or prior to arraignment. 5 A.L.R.3d 1269.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases. 28 A.L.R.4th 1121.

19-1502. Presence of defendant. — If the indictment is for a felony the defendant must be personally present; but if for a misdemeanor, he may appear upon the arraignment by counsel. [Cr. Prac. 1864, § 255; R.S., R.C., & C.L., § 7711; C.S., § 8848; I.C.A., § 19-1402.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

In general.
Waiver.

In General.

Arraignment consists of reading indictment or information to defendant and delivering to him copy thereof and asking him if he pleads guilty or not guilty to such indictment or

information. State v. Poynter, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

Waiver.

If defendant authorizes counsel to enter a plea of guilty in his absence, but is present in person for judgment and is advised by the court of his plea and when asked if he had any legal cause to show why judgment should not be pronounced, answers that he has none, such defendant, after acquiescence for two years, has waived right to plead in person and can not successfully attack such judgment. State v. Poynter, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

Collateral References. In general. 110 A.L.R. 1300.

19-1503. Order for production of defendant. — When his personal appearance is necessary, if he is in custody, the court may direct and the officer in whose custody he is must bring him before it to be arraigned. [Cr. Prac. 1864, § 256; R.S., R.C., & C.L., § 7712; C.S., § 8849; I.C.A., § 19-1403.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1504. Issuance of bench warrant. — If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear to be arraigned when his personal attendance is necessary, the court, in addition to the forfeiture of the undertaking of bail or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. [Cr. Prac. 1864, § 257; R.S., R.C., & C.L., § 7713; C.S., § 8850; I.C.A., § 19-1404.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1505. Clerk to issue warrant. — The clerk, on the application of the prosecuting attorney, may, at any time after the order, whether the court is sitting or not, issue a bench warrant to one (1) or more counties. [Cr. Prac. 1864, § 258; R.S., R.C., & C.L., § 7714; C.S., § 8851; I.C.A., § 19-1405.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1506. Form of bench warrant. — The bench warrant upon the indictment must, if the offense be a felony, be substantially in the following form:

County of

The state of Idaho, to any sheriff, constable, marshal or policeman of this state:

An indictment having been found on the day of, in the district court of the judicial district, in and for the county of, charging C.D. with the crime of (designating it generally); you are therefore commanded forthwith to arrest the above named C.D., and bring him before that court to answer said indictment; or if the court has adjourned for the term, that you deliver him into the custody of the sheriff of the county of

Given under my hand with the seal of said court affixed, this day of,

By order of said court.

(Seal.)

E. F., Clerk.

[Cr. Prac. 1864, § 259; R.S., R.C., & C.L., § 7715; C.S., § 8852; I.C.A., § 19-1406; am. 2002, ch. 32, § 4, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Sections 3 and 5 of S.L. 2002, ch. 32, are compiled as §§ 19-1410 and 19-2909, respectively.

19-1507. Bail. — The defendant, when arrested under a warrant for an offense not bailable, must be held in custody of the sheriff of the county in which the indictment is found, unless admitted to bail after an examination upon a writ of habeas corpus; but if the offense is bailable, there must be added to the body of the bench warrant a direction to the following effect, "or, if he requires it, that you take him before any magistrate in that county, or in the county in which you arrest him, that he may give bail to answer to the indictment"; and the court, upon directing it to issue, must fix the amount of bail, and an endorsement must be made thereon and signed by the clerk, to the following effect: "The defendant is to be admitted to bail in the sum of _____ dollars." [Cr. Prac. 1864, §§ 260-262; R.S., R.C., & C.L., § 7716; C.S., § 8853; I.C.A., § 19-1407.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1508. Service of warrant. — The bench warrant may be served in any county, in the same manner as a warrant of arrest. [Cr. Prac. 1864, § 263; R.S., R.C., & C.L., § 7717; C.S., § 8854; I.C.A., § 19-1408.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1509. Proceedings on giving bail. — If the defendant is brought before a magistrate of another county for the purpose of giving bail, the magistrate must proceed in respect thereto in the same manner as if the defendant had been brought before him upon a warrant of arrest, and the same proceedings must be had thereon. [Cr. Prac. 1864, § 264; R.S., R.C., & C.L., § 7718; C.S., § 8855; I.C.A., § 19-1409.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1510. Increasing bail. — When the indictment is for a felony and the defendant, before the finding thereof, has given bail for his appearance to answer the charge, the court to which the indictment is presented may order the defendant to be committed to actual custody, unless he gives bail in an increased amount, to be specified in the order. [Cr. Prac. 1864, § 265; R.S., R.C., & C.L., § 7719; C.S., § 8856; I.C.A., § 19-1410.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-2930.

19-1511. Commitment of defendant. — If the defendant is present when the order is made he must be forthwith committed. If he is not present a bench warrant must be issued and proceeded upon in the manner provided in this chapter. [Cr. Prac. 1864, § 266; R.S., R.C., & C.L., § 7720; C.S., § 8857; I.C.A., § 19-1411.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1512. Right to counsel. — If the defendant appears for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. [Cr. Prac. 1864, § 267; R.S., R.C., & C.L., § 7721; C.S., § 8858; I.C.A., § 19-1412; am. 1967, ch. 181, § 20, p. 599.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Lawrence, 70 Idaho 422, 220 P.2d 380 (1950); Foster v. Walus, 81 Idaho 452, 347 P.2d 120 (1959); Jackson v. State, 87

Idaho 267, 392 P.2d 695 (1964); *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

ANALYSIS

Advice as to court appointed counsel (decision prior to 1967 amendment).

Appeal.

Construction.

Counsel at interrogation.

Court's duty to appoint.

In general.

Rejection of counsel.

Waiver.

Advice as to Court Appointed Counsel (Decision Prior to 1967 Amendment).

The court did not comply with this section by merely asking the defendant if he desired counsel without also advising him of his right to have counsel appointed by the court at public expense if he was without funds with which to employ counsel and the necessity for such advice was not obviated by the fact that the defendant had previously been so advised by another court when arraigned upon another charge. *Pharris v. State*, 91 Idaho 456, 424 P.2d 390 (1967); *Abercrombie v. State*, 91 Idaho 586, 428 P.2d 505 (1967). (The provision upon which this decision was based was deleted from this section by S.L. 1967, ch. 181, § 20, and is now found in § 19-853.).

Appeal.

Defendant charged with burglary was not deprived of his right of appeal, though he did not have counsel for eight days prior to time his motion for a new trial was overruled, and for 51 days afterward, if he did not ask the court for counsel, or show he was unable to secure counsel. *State v. Kleier*, 69 Idaho 491, 206 P.2d 513 (1949).

Construction.

It is public policy of state to accord every person accused of crime, not only fair and impartial trial, but every reasonable opportunity to prepare his defense and vindicate his innocence. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Action of court in not advising defendant of his right to counsel, or asking him if he desired or was able to employ counsel, but instead instantly assigning him such and fixing date for plea on same day is not compliance with terms of statute which are mandatory. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

The requirements of this section were not complied with by the trial judge asking the defendant if he had an attorney and secondly, if he wanted an attorney, as the defendant necessarily must be informed by the court

that it is his right to have counsel before arraignment, further advising that if he were unable to employ counsel, it was the duty of the court to assign counsel to defend him. *State v. Thurlow*, 85 Idaho 96, 375 P.2d 996 (1962).

Counsel at Interrogation.

A defendant who refused counsel at arraignment is not entitled to release under writ of habeas corpus for lack of counsel at interrogation without an allegation that he was interrogated by police officers. *Starkey v. State*, 91 Idaho 74, 415 P.2d 717 (1966).

A defendant whose conviction became final before the decision in *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), was not entitled to release under writ of habeas corpus for lack of counsel at interrogation, the rule adopted in that decision not being given retroactive effect. *Starkey v. State*, 91 Idaho 74, 415 P.2d 717 (1966).

Court's Duty to Appoint.

Where defendant appeals from the lower court to the district court, and he is poor and unable to procure the services of counsel, it is the duty of the district court to appoint counsel for his defense, even though proceedings were upon a "complaint" and not upon an indictment or "information." *State v. Eikelberger*, 70 Idaho 271, 215 P.2d 996 (1950).

In General.

The court should inform the defendant of his right to counsel and that the court will appoint counsel for him at public expense if he is unable to employ counsel before asking defendant if he wishes to waive his right to counsel. *Bement v. State*, 91 Idaho 388, 422 P.2d 55 (1966).

Rejection of Counsel.

In petition for writ of habeas corpus asserting a violation of constitutional rights, appellant was shown to have waived preliminary hearing upon complaint being read to him and his rights being made known, that on arraignment in the district court he specifically stated he did not desire counsel and he being a man of more than average intelligence it was shown from the time of his arrest to the time of pronouncing sentence that he knew and was fully informed of his rights. *Cobas v. Clapp*, 79 Idaho 419, 319 P.2d 475 (1957), cert. denied, 356 U.S. 941, 78 S. Ct. 785, 2 L. Ed. 2d 816 (1958).

Waiver.

A defendant who knew of his right to counsel evidenced by the fact that he "demanded" that an attorney be appointed to him was held to have waived his right to counsel intelligently and with an understanding of its import when the evidence showed that he knew

of the right by his own testimony and that he waived his right to counsel on four separate occasions. *Jones v. State*, 93 Idaho 859, 477 P.2d 101 (1970).

Where the trial court specifically advised defendant of his right to counsel at all stages of the proceedings and specifically informed him that the court would furnish him counsel if he wanted it, the defendant knowingly and voluntarily waived his right to counsel when

judged by 1964 standards although the present criminal rules contemplate a more comprehensive explanation of all constitutional and statutory rights. *State v. Alldredge*, 96 Idaho 7, 523 P.2d 824 (1974). (Now see § 19-853.).

Collateral References. Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant. 148 A.L.R. 183.

19-1513. Appointment of Counsel for Accused. [Repealed.]

Compiler's notes. This section which comprises 1897, p. 74, § 6; reen. 1899, p. 26, § 1; reen. R.C., § 2086; reen. C.L. § 7721a; C.S.,

§ 8859; I.C.A., § 19-1413; am. 1937, ch. 85, § 1, p. 114, was repealed by S.L. 1967, ch. 181, § 21. For present law see § 19-853.

19-1514. Arraignment, how made. — The arraignment must be made by the court, or by the clerk or prosecuting attorney, under its direction, and consists in reading the indictment to the defendant and delivering to him a copy thereof and of the endorsements thereon, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the indictment. [Cr. Prac. 1864, § 268; R.S., R.C., & C.L., § 7722; C.S., § 8860; I.C.A., § 19-1414.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Petty*, 73 Idaho 25, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

19-1515. Question as to true name of defendant. — When the defendant is arraigned he must be informed that if the name by which he is indicted is not his true name, he must then declare his true name, or be proceeded against by the name in the indictment. If he gives no other name the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted. [Cr. Prac. 1864, §§ 269-271; R.S., R.C., & C.L., § 7723; C.S., § 8861; I.C.A., § 19-1415.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Defendant's Name.

Where an information alleged that the appellant had an alias and no objection was

made either to its form or substance, the objection was therefore waived, and the presumption attached that proceedings were had as prescribed by this section for ascertaining appellant's true name. *State v. Wilson*, 51 Idaho 659, 9 P.2d 497 (1932).

Collateral References. Misnomer of defendant in indictment or information, raising objection of, by plea in abatement. 132 A.L.R. 410.

19-1516. Time allowed for answer. — If, on the arraignment, the defendant requires it, he must be allowed a reasonable time, not less than

one (1) day, to answer the indictment. He may, in answer to the arraignment, move to set aside, demur, or plead to, the indictment. [Cr. Prac. 1864, §§ 272, 273; R.S., R.C., & C.L., § 7724; C.S., § 8862; I.C.A., § 19-1416.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Webb, 76 Idaho 162, 279 P.2d 634 (1955).

ANALYSIS

Right to counsel.

Time allowed for answer.

Right to Counsel.

It is incumbent upon the court upon an arraignment for an offense such as lewd and lascivious conduct to ascertain if the defendant is financially capable of hiring counsel and to advise the defendant in order that he may intelligently respond to the court's interrogation upon this subject. Unless informed of these statutory rights it is conceivable that defendant would not know of their existence and his inability to employ counsel would operate to deny him the opportunity to assert defenses to the charge in violation of his rights of due process. State v. Thurlow, 85 Idaho 96, 375 P.2d 996 (1962).

Where certain factors exist which may render state criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the constitution requires the accused must have legal assistance at his trial, such factors being the age and

education of the defendant, the conduct of the court, the complicated nature of the offense charged and the possible defenses thereto. State v. Thurlow, 85 Idaho 96, 375 P.2d 996 (1962).

Time Allowed for Answer.

Requiring defendant to plead on same day of arraignment with insufficient time to consult with young and inexperienced counsel is erroneous. State v. Poglianich, 43 Idaho 409, 252 P. 177 (1927).

Defendant was not deprived of his right of at least one day to answer the indictment or to move to set it aside, demur or plead to the indictment, where he was arraigned on February 3rd, his motion to quash and set aside information was denied February 14th and the case became at issue on May 23rd when, upon having the information again read to him and refusing to plead to the charge, the court directed the clerk to enter a plea of not guilty for the defendant. State v. Cronk, 78 Idaho 585, 307 P.2d 1113 (1957).

Alleged error of the trial court in allowing the defendant only 24 hours in which to prepare his plea was without merit in the absence of evidence in the record to show that he was prejudiced by the shortness of the time, in view of his failure to object at the time of the ruling, and in view of his failure to present additional information in support of his motion for additional time which the court could consider during the voir dire examination. State v. Rolfe, 92 Idaho 467, 444 P.2d 428 (1968).

CHAPTER 16

SETTING ASIDE INDICTMENT

SECTION.

19-1601. Grounds for setting aside indictment.

19-1602. Waiver of objections.

SECTION.

19-1603. Hearing and disposition of motion.

19-1604. Order for resubmission.

19-1605. Order no bar to future prosecution.

19-1601. Grounds for setting aside indictment. — The indictment must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

1. When it is not found, endorsed and presented as prescribed in this code.

2. When the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or endorsed thereon.

3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in chapter 11 of this title.

4. When the defendant has not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror. [Cr. Prac. 1864, §§ 274, 275; R.S., R.C., & C.L., § 7730; C.S., § 8863; I.C.A., § 19-1501; am. 1970, ch. 60, § 3, p. 146; am. 2003, ch. 140, § 1, p. 408.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S.L. 1970, ch. 60 is compiled as § 19-1115.

Cross ref. Indictment and information, I.C.R. 7.

Sec. to sec. ref. This section is referred to in § 19-1602.

Cited in: *Territory v. Staples*, 3 Idaho 35, 26 P. 166 (1891); *Thompson v. Adair*, 36 Idaho 790, 214 P. 214 (1923).

ANALYSIS

Grand jury.

Information.

In general.

Preliminary examination.

Requisites of motion.

Time for motion.

Unlawful search.

Waiver of defects.

Grand Jury.

This clause means that no person except a member of the grand jury must be present and does not refer to members of panel, and indictment will not be set aside because of the presence of a grand juror who was a witness against defendant. *Territory v. Staples*, 3 Idaho 35, 26 P. 166 (1891).

Mere irregularity in procedure in summoning grand jury is not ground for quashing indictment, unless prejudice results to substantial rights of defendant. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

Where irregularities in summoning and impaneling grand jury are such that grand jury acquires no legal existence, indictment should be quashed. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

Motion to set aside indictment, made at time of arraignment, will lie for any ground which would have been good for challenge to panel or any individual grand juror. *State v. Roberts*, 33 Idaho 30, 188 P. 895 (1920).

Information.

This statute applies to informations so that neither indictments nor informations may be quashed except on grounds set forth herein. *State v. Hunt*, 57 Idaho 122, 62 P.2d 1372 (1936).

In General.

Statute in defining and allowing the grounds stated in this section for setting aside indictment excludes all others; therefore failure of district attorney to sign bill of indictment as required by laws 3d Terr. Sess., ch. 187, § 3, is not ground for setting aside indictment. *People v. Butler*, 1 Idaho 231 (1869).

Irregularity in failing to verify an information can be taken advantage of by defendant only by motion to set aside the information. In re *Marshall*, 6 Idaho 516, 56 P. 470 (1899).

Demand for bill of particulars does not seem to take place of demurrer or proceedings to set aside indictment. *State v. Neil*, 58 Idaho 359, 74 P.2d 586 (1937).

Preliminary Examination.

District court is not authorized to review decision of committing magistrate as to question of sufficiency or competency of evidence taken in preliminary examination. *State v. Foell*, 37 Idaho 722, 217 P. 608 (1923).

Insufficiency of evidence before committing magistrate is not within the purview of this section. *State v. Miller*, 52 Idaho 33, 10 P.2d 955 (1932).

This section does not authorize the district court to quash an information because of the insufficiency of the evidence taken at a preliminary hearing to sustain the order of the committing magistrate in holding the defendant to answer to the district court. *State v. Bauman*, 89 Idaho 519, 406 P.2d 810 (1965).

Requisites of Motion.

Motion to set aside indictment on ground that certain of the grand jurors had formed an unqualified opinion as to the guilt of defendant prior to examination by them of the case as grand jurors, should be supported by proof, at least to the extent of the oath of defendant, and when not so supported court can not be required to summon such grand jurors into court to be examined on the charges so made against them. *State v. Hardy*, 4 Idaho 478, 42 P. 507 (1895).

Motion by defendant in arrest of judgment in second trial based on double jeopardy in that court in first trial dismissed hung jury without defendant or counsel being present, was properly denied, since motion was not timely, as it should have been filed at beginning of second trial. *State v. Davis*, 72 Idaho 115, 238 P.2d 450 (1951).

Time for Motion.

Motion to quash indictment must be made before demurrer or plea. *People v. Butler*, 1 Idaho 231 (1869).

Jurisdiction of court could not be attacked for purpose of preventing trial of indictment for alleged irregularities in grand jury proceeding where no motion was filed to set the indictment aside for claimed defects. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Unlawful Search.

It was proper to deny motion to quash information based on ground that evidence was obtained in an unlawful search under void search warrant. *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927).

Waiver of Defects.

Objection to an information on ground that the depositions taken before the committing magistrate on preliminary examination are

not certified by magistrate as required by law, is waived, unless raised on motion to quash or to set aside the information before plea. *State v. Clark*, 4 Idaho 7, 35 P. 710 (1894).

Defendant who is under arrest and appears in open court with his counsel at time grand jury is impaneled and declines to challenge the panel or any of the individual jurors can not thereafter move to set aside indictment on any ground which would have been cause for challenge to the grand jury. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

Where information is signed by "acting prosecuting attorney," and record fails to show appointment of special prosecuting attorney, defect is waived if raised for first time in Supreme Court. *State v. Price*, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458 (1923).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 770 — 784.

42 C.J.S., Indictments and Informations, §§ 171 — 185.

19-1602. Waiver of objections. — If the motion to set aside the indictment is not made the defendant is precluded from afterward taking the objections mentioned in the last section. [Cr. Prac. 1864, § 276; R.S., R.C., & C.L., § 7731; C.S., § 8864; I.C.A., § 19-1502.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Freeman v. State*, 87 Idaho 170, 392 P.2d 542 (1964).

ANALYSIS

Jurisdiction.

Raising objections.

Verification.

Waiver of unnecessary delay.

Jurisdiction.

Jurisdiction of court could not be attacked for purpose of preventing trial of indictment for alleged irregularities in grand jury proceeding where no motion was filed to set the indictment aside for claimed defects. *Gasper v. District Court*, 74 Idaho 388, 264 P.2d 679 (1953).

Raising Objections.

Alleged errors or irregularities in the pre-

liminary proceedings before the committing magistrate cannot be raised for the first time on a habeas corpus proceeding instituted to secure the prisoner's release from confinement in the penitentiary. Any objections to the information because of failure to comply with rules governing a preliminary examination are waived unless raised on motion to quash or set aside the information before plea. *Cobas v. Clapp*, 79 Idaho 419, 319 P.2d 475 (1957), cert. denied, 356 U.S. 941, 78 S. Ct. 785, 2 L. Ed. 2d 816 (1958).

Verification.

Objection to an information because not verified is waived if not made by motion. In re *Marshall*, 6 Idaho 516, 56 P. 470 (1899).

Waiver of Unnecessary Delay.

Failure of state to bring defendant before a magistrate without unnecessary delay was waived by the defendant where motion to dismiss for alleged irregularity was not filed until after defendant had entered his plea. *State v. Bedwell*, 77 Idaho 57, 286 P.2d 641 (1955).

19-1603. Hearing and disposition of motion. — The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment, either by demurring or pleading

thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury. [Cr. Prac. 1864, §§ 277-279; R.S., R.C., & C.L., § 7732; C.S., § 8865; I.C.A., § 19-1503.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Douglass, 35 Idaho 140, 208 P. 236 (1922); State v. Slater, 72 Idaho 383, 241 P.2d 1189 (1952).

ANALYSIS

Defective preliminary examination.
Exoneration of bail.
Resubmission.

Defective Preliminary Examination.

If information is ordered quashed for defects in such instrument, district court may order new one filed in that court; but where defects relate to irregularities in preliminary proceedings, cause should be remanded to magistrate's court for their correction. Thompson v. Adair, 36 Idaho 790, 214 P. 214 (1923).

19-1604. Order for resubmission. — If the court directs the case to be resubmitted, the defendant, if already in custody, must so remain, unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment; and, unless a new indictment is found before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section. [Cr. Prac. 1864, §§ 280, 281; R.S., R.C., & C.L., § 7733; C.S., § 8866; I.C.A., § 19-1504.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Bilboa, 38 Idaho 92, 222 P. 785 (1923); State v. Slater, 72 Idaho 383, 241 P.2d 1189 (1952); Martin v. Lyons, 98 Idaho 102, 558 P.2d 1063 (1977).

ANALYSIS

Dismissal without prejudice.
Proceedings upon resubmission.

Exoneration of Bail.

If the court does not order resubmission, the court has no discretion whatsoever with regard to the exoneration of defendant's bail: exoneration must be ordered. Martin v. Lyons, 98 Idaho 102, 558 P.2d 1063 (1977).

Where the court failed to order resubmission following a successful motion to quash and later an amended complaint was filed and defendant failed to appear at the preliminary hearing, the court's forfeiture of the bail bond was invalid, since the court was obligated to exonerate the bail bond when it failed to order resubmission. Martin v. Lyons, 98 Idaho 102, 558 P.2d 1063 (1977).

Resubmission.

Where surety on a bail bond failed to show that the case was resubmitted following a successful motion to quash, it was presumed that resubmission did not occur. Martin v. Lyons, 98 Idaho 102, 558 P.2d 1063 (1977).

Dismissal Without Prejudice.

Order for resubmission is not necessary where action was dismissed without prejudice and prosecutor relieved from filing information based upon preliminary examination already held. In such case another examination may be had and information thereon filed. State v. Wilson, 41 Idaho 616, 243 P. 359 (1925).

Proceedings Upon Resubmission.

It is proper to incorporate in order of resubmission instructions to have answers of witnesses at preliminary hearing read to them and have same subscribed by them.

State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

Upon being remanded, proceedings may be had de novo to extent of filing new complaint and taking testimony, and such proceedings

do not constitute new cause of action, but defendant remains in custody or in bail as case may be. Thompson v. Adair, 36 Idaho 790, 214 P. 214 (1923).

19-1605. Order no bar to future prosecution. — An order to set aside an indictment, as provided in this chapter, is no bar to a future prosecution for the same offense. [Cr. Prac. 1864, § 282; R.S., R.C., & C.L., § 7734; C.S., § 8867; I.C.A., § 19-1505.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Douglass, 35 Idaho 140, 208 P. 236 (1922); State v. Slater, 72 Idaho 383, 241 P.2d 1189 (1952).

CHAPTER 17

PLEADINGS BY DEFENDANT

SECTION.

19-1701. Demurrer or plea.

19-1702. Demurrer or plea — When interposed.

19-1703. Ground for demurrer.

19-1704. Form of demurrer.

19-1705. Argument on demurrer.

19-1706. Judgment on demurrer.

19-1707. Effect of judgment.

19-1708. Discharge of defendant.

19-1709. Resubmission of charge.

19-1710. Plea after disallowance.

19-1711. Objections must be taken by demurrer.

SECTION.

19-1712. Kinds of pleas.

19-1713. Form of pleas.

19-1714. Plea of guilty.

19-1715. Plea of not guilty.

19-1716. Evidence admissible under plea of not guilty.

19-1717. What is not a former acquittal.

19-1718. What is a former acquittal.

19-1719. Conviction or acquittal bars included offenses.

19-1720. Refusal to answer.

19-1701. Demurrer or plea. — The only pleading on the part of the defendant is either a demurrer or a plea. [Cr. Prac. 1864, § 283; R.S., R.C., & C.L., § 7740; C.S., § 8868; I.C.A., § 19-1601.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Pleadings and motions before trial, demurrers abolished, I.C.R. 12.

Pleas, I.C.R. 11.

ANALYSIS

Bill of particulars.

Demurrer.

Bill of Particulars.

A demand for a bill of particulars does not take the place of a demurrer. State v. Neil, 58 Idaho 359, 74 P.2d 586 (1937).

Demurrer.

A lower court may entertain a pleading such as a motion to quash and set aside the information, but under this section it must be considered a demurrer. State v. Brinton, 91 Idaho 856, 433 P.2d 126 (1967).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 600 — 631.

21A Am. Jur. 2d, Criminal Law, §§ 632 — 769.

22 C.J.S., Criminal Law, §§ 366 — 418.

Duty of court, upon plea of guilty or nolo contendere to offense involving several degrees, to hear evidence to determine degree. 34 A.L.R.2d 919.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa. 37 A.L.R.2d 1068.

Plea of guilty in police, magistrate, municipal, or similar inferior court as precluding

appeal. 42 A.L.R.2d 995.

Discharge of accused for holding him excess time without trial is bar to a subsequent prosecution for same offense. 50 A.L.R.2d 943.

Conviction or acquittal in attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa. 53 A.L.R.2d 622.

Conviction of lesser offenses bar to prosecution for greater or new trial. 61 A.L.R.2d 1141.

Conviction from which appeal is pending is bar to another prosecution for same offense under rule against double jeopardy. 61 A.L.R.2d 1224.

Guilty plea as basis of claim of double jeopardy in attempted subsequent prosecution for same offense. 75 A.L.R.2d 683.

Effect as double jeopardy of court's grant of new trial on own motion in criminal case. 85 A.L.R.2d 486.

Plea of *nolo contendere* or *non vult contendere*. 89 A.L.R.2d 540.

Jurisdiction to proceed with trial of case pending appeal from order overruling demurrer, motion to quash, or similar motion for dismissal. 89 A.L.R.2d 1236.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof. 97 A.L.R.2d 549.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense

arising out of the same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy. 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide. 11 A.L.R.3d 834.

Single or separate larceny predicated upon stealing property from different owners at same time. 37 A.L.R.3d 1407.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecution attorney involving immunity from prosecution for other crimes. 43 A.L.R.3d 281.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time. 51 A.L.R.3d 693.

Admissibility of defense communications made in connection with plea bargaining. 59 A.L.R.3d 441.

Right to withdraw guilty plea in state criminal proceedings where court refuses to grant concession contemplated by plea bargain. 66 A.L.R.3d 902.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal. 86 A.L.R.3d 1262.

19-1702. Demurrer or plea — When interposed. — Both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose. [Cr. Prac. 1864, § 284; R.S., R.C., & C.L., § 7741; C.S., § 8869; I.C.A., § 19-1602.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Demurrer After Judgment.

There is no provision for demurrer after judgment. *State v. Hinckley*, 4 Idaho 490, 42 P. 510 (1895); *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

19-1703. Ground for demurrer. — The defendant may demur to the indictment when it appears upon the face thereof, either:

1. That the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of the county.

2. That it does not substantially conform to the requirements of sections 19-1409, 19-1410 and 19-1411.

3. That more than one offense is charged in the indictment.

4. That the facts stated do not constitute a public offense.

5. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar

to the prosecution. [Cr. Prac. 1864, § 285; R.S., R.C., & C.L., § 7742; C.S., § 8870; I.C.A., § 19-1603.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Hinckley, 4 Idaho 490, 42 P. 510 (1895); In re Dawson, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911); State v. Bilboa, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923); State v. Price, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458 (1923); In re Bottjer, 45 Idaho 168, 260 P. 1095 (1927); State v. Frank, 51 Idaho 21, 1 P.2d 181 (1931); State v. Smailes, 51 Idaho 321, 5 P.2d 540 (1931); State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959); State v. Oldham, 92 Idaho 124, 438 P.2d 275 (1968); State v. Gumm, 99 Idaho 549, 585 P.2d 959 (1978).

ANALYSIS

Defect in form.
Evidence.
Failure to demur.
Insufficient facts.
Limitation of actions.
More than one offense charged.
Preindictment delay.
Validity of ordinance.

Defect in Form.

Where defect in information is one of form rather than substance, it should be taken by demurrer. State v. Arnold, 39 Idaho 589, 229 P. 748 (1924).

In information, which charged defendant with committing lewd and lascivious acts committed on female under the age of 16 with the intent of arousing, appealing to and gratifying the lusts and passions of sexual desires of said defendant and said minor, and which added "with the intent and purpose of having sexual intercourse with the said minor child," the last sentence was surplusage, since state intended to charge defendant under § 18-1508, to wit, lewd and lascivious conduct. State v. Petty, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Assuming that criminal procedure rules applied to contempt proceedings to enforce support order the defendant waived defect or irregularity in affidavit to show cause where defendant failed to object to affidavit at time of trial. In re Martin, 76 Idaho 179, 279 P.2d 873 (1955).

An objection to an information that it does not state facts sufficient to constitute a public offense may be made by demurrer or under a plea of not guilty, and after trial by a motion

in arrest of judgment. State v. Webb, 76 Idaho 162, 279 P.2d 634 (1955).

Evidence.

Grounds of demurrer cannot be raised by objection to evidence under these sections. State v. Neil, 58 Idaho 359, 74 P.2d 586 (1937).

Failure to Demur.

A defendant who failed to demur to a complaint for reckless driving could not by motion in arrest of judgment at the close of the trial raise the objection that the complaint did not fully state the manner of driving which constituted the offense of reckless driving with which he was charged. State v. Pruett, 91 Idaho 537, 428 P.2d 43 (1967).

Where defendant contended on appeal that the information failed to meet the requirements of I. C., §§ 19-1409 and 19-1411, his failure to challenge the sufficiency of the information by demurrer constituted a waiver of any objections to the information on these grounds. State v. Segovia, 93 Idaho 594, 468 P.2d 660 (1970).

Where defendant's motion to dismiss an information charging him with involuntary manslaughter was grounded on the insufficiency of evidence at the preliminary hearing, the motion did not raise a defense or objection which was a ground for a demurrer under this section and therefore an appeal by the state from an order dismissing the information was not authorized by former law providing that the state could appeal from a judgment for defendant on demurrer to the information. State v. Blair, 97 Idaho 646, 551 P.2d 601 (1976).

Insufficient Facts.

The complaint filed in the justice court charged defendant with reckless driving in the language of the statute. There was nothing in the complaint to indicate what acts of the defendant constituted alleged reckless driving. In view of this deficiency, the order of the court sustaining the demurrer was correct. State v. Henry, 83 Idaho 167, 359 P.2d 514 (1961).

Limitation of Actions.

Where information charges that misdemeanor was committed more than year before filing thereof, it is subject to demurrer. State v. Steensland, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Although information for acting as real estate salesman without license contains nothing to show that it was brought within period of limitation where record showed that complaint was filed within period of limitation demurrer should have been overruled. State v. Morris, 81 Idaho 267, 340 P.2d 447 (1959).

More Than One Offense Charged.

Indictment charging more than one offense is open to demurrer. *State v. Cooper*, 35 Idaho 73, 204 P. 204 (1922).

Where an information charges the stealing of a cow and her calf in a single count as one transaction, and testimony shows that the taking of the animals constituted two separate and distinct offenses, motion to require state to elect which offense it relied on for a conviction should be granted. *State v. Sorensen*, 37 Idaho 517, 216 P. 727 (1923).

Any alleged duplicity in information can not be considered on motion in arrest of judgment, in absence of a previous demurrer on that ground. *State v. Knutson*, 47 Idaho 281, 274 P. 108 (1929); *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929).

Although language of information was sufficient to cover both assault with deadly weapon and battery, it was not duplicitous where the clear intent was to charge assault only. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

State can elect to prosecute defendant on included offense, even though a higher offense has also been committed. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953).

Rule against charging more than one offense in criminal case does not apply to included offenses. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952), appeal dismissed, 345 U.S. 938, 73 S. Ct. 834, 97 L. Ed. 1364 (1953); *State v. Wall*, 73 Idaho 142, 248 P.2d 222 (1952).

Where the information charged an aggravated battery committed by defendant with premeditated design and by means calculated and likely to inflict great bodily injury, it was sufficient to charge an aggravated assault as well as aggravated battery; the assault, having been alleged as the manner and means of the commission of the aggravated battery, was an included offense and the information therefore was not duplicitous. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Preindictment Delay.

Motions to dismiss which were based on preindictment delay raise an objection which was formerly a ground for demurrer. *State v. Murphy*, 99 Idaho 511, 584 P.2d 1236 (1978).

Validity of Ordinance.

The validity of an ordinance under which a conviction is had may be challenged by a motion for arrest of judgment. *Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956).

19-1704. Form of demurrer. — The demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it must be disregarded. [Cr. Prac. 1864, § 286; R.S., R.C., & C.L., § 7743; C.S., § 8871; I.C.A., § 19-1604.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1705. Argument on demurrer. — Upon the demurrer being filed, the argument upon the objections presented thereby must be heard, either immediately or at such time as the court may appoint. [Cr. Prac. 1864, § 287; R.S., R.C., & C.L., § 7744; C.S., § 8872; I.C.A., § 19-1605.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

19-1706. Judgment on demurrer. — Upon considering the demurrer, the court must give judgment either allowing or disallowing it, and an order to that effect must be entered upon the minutes. [Cr. Prac. 1864, § 288; R.S., R.C., & C.L., § 7745; C.S., § 8873; I.C.A., § 19-1606.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *In re Pierce*, 8 Idaho 183, 67 P. 316 (1901).

Appeal.

A demurrer by the defendant to an informa-

19-1707. Effect of judgment. — If the demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be resubmitted to the same or another grand jury. [Cr. Prac. 1864, § 289; R.S., R.C., & C.L., § 7746; C.S., § 8874; I.C.A., § 19-1607.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Appeal.

Insufficient facts.

Leave to file new information.

New information.

Second information barred.

Appeal.

A demurrer by the defendant to an information for burglary that the information did not conform to requirements of § 19-1411 in that the information was not direct and certain as regards the offense charged, which demurrer was sustained, and judgment entered in the minutes, was a judgment from which the state could appeal where it indicated that it did not desire to amend. *State v. Eubanks*, 77 Idaho 439, 294 P.2d 273 (1956).

Where after appellant rested case at conclusion of state's evidence defendant demurred to the evidence which the court treated as a demurrer to the information and sustained, it was proper for appellant, although afforded an opportunity to file a new information, to elect not to file an amended information and appeal. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

Insufficient Facts.

The complaint filed in the justice court

tion for burglary that the information did not conform to requirements of § 19-1411 in that the information was not direct and certain as regards the offense charged, which demurrer was sustained, and judgment entered in the minutes, was a judgment from which the state could appeal where it indicated that it did not desire to amend. *State v. Eubanks*, 77 Idaho 439, 294 P.2d 273 (1956).

charged defendant with reckless driving in the language of the statute. There was nothing in the complaint to indicate what acts of the defendant constituted alleged reckless driving. In view of this deficiency, the order of the court sustaining the demurrer was correct. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

Leave to File New Information.

Order sustaining a demurrer to an information and granting county attorney leave to file a new information is equivalent to directing county attorney to file a new information, insofar as to authorize the filing of same and trial of accused thereunder. *In re Pierce*, 8 Idaho 183, 67 P. 316 (1901).

New Information.

New information filed after demurrer sustained on ground of duplicity is not an amended information or continuation of prosecution under the original information. *State v. Bilboa*, 38 Idaho 98, 213 P. 1025, 222 P. 785 (1923).

Second Information Barred.

It must appear upon face of record that subsequent complaint charged same offense as information to which demurrer was sustained. *State v. Bilboa*, 33 Idaho 128, 190 P. 248 (1920).

In order that action of court in sustaining demurrer may be bar to future prosecution, evidence must be submitted that offense subsequently charged is same. *State v. Bilboa*, 33 Idaho 128, 190 P. 248.

19-1708. Discharge of defendant. — If the court does not direct the case to be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him. [Cr. Prac. 1864, § 290; R.S., R.C., & C.L., § 7747; C.S., § 8875; I.C.A., § 19-1608.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *In re Pierce*, 8 Idaho 183, 67 P. 316 (1901); *Mahoney v. Elliott*, 8 Idaho 190, 67 P. 317 (1902).

19-1709. Resubmission of charge. — If the court directs that the case be resubmitted, the same proceedings must be had thereon as when the indictment is set aside on motion. [Cr. Prac. 1864, § 291; R.S., R.C., & C.L., § 7748; C.S., § 8876; I.C.A., § 19-1609.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. See note to § 19-1707. *State v. Bilboa*, 38 Idaho 92, 213 P. 1025, 222 P. 785 (1923).

Cited in: *State v. Slater*, 72 Idaho 383, 241 P.2d 1189 (1952).

19-1710. Plea after disallowance. — If the demurrer is disallowed, the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may direct. If he does not plead, the plea of not guilty must be entered for him. [Cr. Prac. 1864, § 292; R.S., R.C., & C.L., § 7749; C.S., § 8877; I.C.A., § 19-1610.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *In re Carpenter*, 88 Idaho 567, 401 P.2d 800 (1965); *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

19-1711. Objections must be taken by demurrer. — When the objections declared grounds of demurrer by this chapter appear upon the face of the indictment, they can only be taken by demurrer, except that the objections to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial under the plea of not guilty, or after the trial in arrest of judgment. [Cr. Prac. 1864, § 293; R.S., R.C., & C.L., § 7750; C.S., § 8878; I.C.A., § 19-1611.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Piatt v. Piatt*, 32 Idaho 407, 184 P.

470 (1919); *State v. Bilboa*, 38 Idaho 98, 213 P. 1025, 222 P. 785 (1923); *State v. Price*, 38 Idaho 149, 219 P. 1049, 35 A.L.R. 1458 (1923); *State v. Wilson*, 41 Idaho 598, 242 P. 787 (1925); *State v. Neil*, 58 Idaho 359, 74 P.2d 586 (1937); *In re Martin*, 76 Idaho 179, 279 P.2d 873 (1955); *State v. Pruett*, 91 Idaho 537, 428 P.2d 43 (1967).

ANALYSIS

Duplicity.

Failure to state offense.

Jurisdiction.

Statute of limitations.

Waiver.

Duplicity.

Objection that indictment charges more than one offense is waived by failure to demur. *People v. Nash*, 1 Idaho 206 (1868); *State v. Bilboa*, 33 Idaho 128, 190 P. 248 (1920); *State v. Knutson*, 47 Idaho 281, 274 P. 108 (1929); *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929).

Objection that information charges two offenses must be taken by demurrer or by motion to require state to elect. *State v. Upham*, 52 Idaho 340, 14 P.2d 1101 (1932).

Failure to State Offense.

Objection that an information does not state facts sufficient to constitute a public offense, in order to be available on appeal, must be raised by demurrer or by motion in arrest. It cannot be raised for first time in Supreme Court. *State v. Hinckley*, 4 Idaho 490, 42 P. 510 (1895).

In an information for grand larceny, in taking property from one's person, necessity of alleging value of the property is a question going to the sufficiency of information. It is not a question of jurisdiction, and the only way in which such question can be raised is by demurrer at trial, under plea of not guilty; or, after trial, in arrest of judgment. If defendant pleads guilty, and no motion in arrest of judgment is made, objection that information does not charge a public offense, in not alleging value of the property taken, is waived. In *re Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

Objection that information does not state facts sufficient to constitute a public offense must be made on demurrer or motion in arrest of judgment; it comes too late on appeal and is waived. *State v. Sedam*, 62 Idaho 26, 107 P.2d 1065 (1940).

An objection to an information that it does not state facts sufficient to constitute a public offense may be made by demurrer or under a plea of not guilty, and after trial by a motion in arrest of judgment. *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955).

Where defendant contended on appeal that

the information failed to meet the requirements of §§ 19-1409 and 19-1411, his failure to challenge the sufficiency of the information by demurrer constituted a waiver of any objections to the information on these grounds. *State v. Segovia*, 93 Idaho 594, 468 P.2d 660 (1970).

Jurisdiction.

Motion in arrest of judgment based on ground that information failed to state that crime was committed in county in which filed, or in state of Idaho was proper, since district court did not have jurisdiction. *State v. Slater*, 71 Idaho 335, 231 P.2d 424 (1951).

Statute of Limitations.

Under this section plea of not guilty presents as issue of fact question of bar of statute. Where issue is so raised upon trial, state must prove commission of offense within statutory period or existence of conditions which preserves right in state to prosecute after that time. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Since there are conditions under which accused may be tried and convicted of offense committed prior to statutory period of limitations, it does not necessarily follow that court is without jurisdiction to proceed in case, though offense is alleged to have been committed prior to statutory period. *State v. Steensland*, 33 Idaho 529, 195 P. 1080, 13 A.L.R. 1442 (1921).

Although information for acting as real estate salesman without license contains nothing to show that it was brought within the period of limitations when record showed that complaint was filed within period of limitation demurrer should have been overruled. *State v. Morris*, 81 Idaho 267, 340 P.2d 447 (1959).

Waiver.

Failure of indictment for murder to state that death occurred within a year and a day is waived if not raised by demurrer. In *re Alcorn*, 7 Idaho 101, 60 P. 561 (1900).

Objections to sufficiency of information and proceedings in district court are waived where no motion to quash, demurrer, or motion in arrest of judgment was filed, and first attack is made upon application for writ of habeas corpus. In *re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927).

19-1712. Kinds of pleas. — There are four (4) kinds of pleas to an indictment. A plea of:

1. Guilty.

2. Not guilty.

3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty.

4. Once in jeopardy. [Cr. Prac. 1864, § 294; R.S., R.C., & C.L., § 7755; C.S., § 8879; I.C.A., § 19-1612.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Poynter*, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

ANALYSIS

Application.

Former acquittal.

Instructions on impermissible plea.

Necessity for plea.

Once in jeopardy.

Necessity for plea.

Plea of guilty.

Application.

The four kinds of pleas apply to charges by an information as well as to an indictment returned by a grand jury. *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975), overruled on other grounds *State v. Dopp*, 124 Idaho 482, 861 P.2d 51 (1993).

Former Acquittal.

Judgment of conviction should not be entered unless jury has passed on plea of former acquittal adversely to defendant. *State v. Gutke*, 25 Idaho 737, 139 P. 346 (1914).

Instructions on Impermissible Plea.

Where jury was specifically instructed that the defendant in a murder prosecution had pleaded not guilty to both counts of murder, and had been carefully instructed as to the issue of defendant's consciousness, the court was not in error in failing to inform the jury that defendant had pleaded not guilty by reason of not being conscious of committing acts charged, since such a plea was not permissible. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

Necessity for Plea.

Section 19-1713 providing the form of each of the pleas named in this section that must be entered upon the minutes of the court, or, at least, a substantial compliance therewith

are both mandatory in form and have been adjudged such by decisions of this court. *State v. Burwell*, 67 Idaho 373, 181 P.2d 197 (1947).

Once in Jeopardy.

Plea of once in jeopardy is not demurrable, as under this section it raises issue of fact, triable only by jury. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

State v. Gutke, 25 Idaho 737, 139 P. 346 (1914), upheld a plea of former acquittal (distinct from a plea of former jeopardy this section), based upon an acquittal of a misdemeanor, pleaded in bar of a subsequent misdemeanor charge on the same set of facts, in that the state had had a free choice of election and if it selected one misdemeanor upon which the defendant was acquitted it could not thereafter try him on another misdemeanor charge predicated on the same state of facts. The court did not consider a factual situation similar to that herein where death ensued after the attaching of jeopardy attendant to a misdemeanor. *State v. Randolph*, 61 Idaho 456, 102 P.2d 913 (1940).

Motion by defendant in arrest of judgment in second trial based on double jeopardy in that court in first trial dismissed hung jury without defendant or counsel being present, was properly denied, since motion was not timely, as it should have been filed at beginning of second trial. *State v. Davis*, 72 Idaho 115, 238 P.2d 450 (1951).

Necessity for Plea.

Section 19-1713 providing the form of each of the pleas named in this section that must be entered upon the minutes of the court, or, at least, a substantial compliance therewith are both mandatory in form and have been adjudged such by decisions of this court. *State v. Burwell*, 67 Idaho 373, 181 P.2d 197 (1947).

Plea of Guilty.

Where accused, with a full knowledge of his constitutional rights, enters plea of guilty and presents no issue of fact for trial, there can be no trial. Conviction is accused's admission, and takes the place of a verdict of a jury. In re *Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

19-1713. Form of pleas. — Every plea must be oral, and entered upon the minutes of the court in substantially the following form:

1. If the defendant pleads guilty: "The defendant pleads that he is guilty of the offense charged."

2. If he pleads not guilty: "The defendant pleads that he is not guilty of the offense charged."

3. If he pleads a former conviction or acquittal: "The defendant pleads that he has already been convicted (or acquitted) of the offense charged by the judgment of the court of _____ (naming it) rendered at _____ (naming the place), on the _____ day of _____."

4. If he pleads once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged (specifying the time, place and court)." [Cr. Prac. 1864, §§ 295, 296; R.S., R.C., & C.L., § 7756; C.S., § 8880; I.C.A., § 19-1613.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Suttles, 13 Idaho 88, 88 P. 238 (1907); State v. Poynter, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

ANALYSIS

Former acquittal.

Motion in arrest of judgment.

Necessity for plea.

Former Acquittal.

Plea of former acquittal or conviction must be in accordance with statutory form or it will be insufficient. State v. Wilson, 41 Idaho 598, 242 P. 787 (1925).

Plea setting up failure of grand jury to

indict is not sufficient, as no action of grand jury could acquit in statutory sense. State v. Wilson, 41 Idaho 598, 242 P. 787 (1925).

Motion in Arrest of Judgment.

Motion by defendant in arrest of judgment in second trial based on double jeopardy in that court in first trial dismissed hung jury without defendant or counsel being present, was properly denied, since motion was not timely, as it should have been filed at beginning of second trial. State v. Davis, 72 Idaho 115, 238 P.2d 450 (1951).

Necessity for Plea.

Judgment of conviction was reversed where the minute entry stated "and the defendant's plea stated" without showing what the plea was, on the ground that defendant had not entered any plea to amended information as required by this section. State v. Burwell, 67 Idaho 373, 181 P.2d 197 (1947).

19-1714. Plea of guilty. — A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment against a corporation, in which case it may be put in by counsel. The court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted: provided, that upon the application of the defendant, a plea of guilty may be received, and sentence may be passed, at chambers as provided in section 1-901. [Cr. Prac. 1864, §§ 297, 298; R.S., § 7757; am. R.C. & C.L., § 7757; C.S., § 8881; I.C.A., § 19-1614.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 1-901 referred to in this section has been repealed.

Cited in: In re Dawson, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

ANALYSIS

Acceptance of guilty plea.

Plea bargain agreement.

Purpose.

Waiver of personal plea.

Withdrawal of plea.

Acceptance of Guilty Plea.

Where defendant in a lewd conduct and sexual abuse of a minor case initially denied the intent element of lewd conduct before the court accepted his plea of guilty, and then after a ten-minute recess, defendant admitted to the intent alleged, the trial court did not err in accepting defendant's guilty plea. State v. Sabin, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Plea Bargain Agreement.

The trial court did not abuse its discretion in accepting a plea bargain agreement

whereby the defendant entered a plea of guilty to second-degree murder in exchange for a recommendation by the prosecutor to the court for a sentence not to exceed 16 years and a promise that if the court adjudged a longer sentence, an opportunity to withdraw his plea. *State v. Cleverly*, 101 Idaho 596, 618 P.2d 774 (1980).

Purpose.

Purpose of statute is to prevent entry of plea of guilty, except under circumstances making it perfectly clear that defendant enters such plea voluntarily, that he understands significance of plea and, with such understanding, is willing to take consequences. *State v. Poynter*, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

Waiver of Personal Plea.

Right to personal plea of guilty may be waived by defendant, where circumstances indicate his willingness to forego his legal right and none of his interests have been adversely affected. *State v. Poynter*, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921).

Withdrawal of Plea.

District court may, after judgment, grant motion for leave to withdraw plea of guilty and substitute plea of not guilty where plea of guilty was not made voluntarily or with full understanding of nature of act. *State v. Raponi*, 32 Idaho 368, 182 P. 855 (1919); *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Discretion to allow plea of guilty to be withdrawn should be liberally exercised. *State v. Raponi*, 32 Idaho 368, 182 P. 855 (1919); *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

Order of trial court denying motion for leave to withdraw plea of guilty and substitute one of not guilty will not be reversed save for abuse of discretion. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

19-1715. Plea of not guilty. — The plea of not guilty puts in issue every material allegation of the indictment, information or complaint except that mental disease or defect excluding responsibility may be raised as a defense only in the manner provided for in this act. [Cr. Prac. 1864, § 299; R.S., R.C., & C.L., § 7758; C.S., § 8882; I.C.A., § 19-1615; am. 1970, ch. 31, § 13, p. 61.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The words "this act" refer to S.L. 1970, ch. 31, §§ 1-12 of which were repealed, and §§ 13

Where duty of court has not been fully complied with in some of the statutory requirements which have been held to be mandatory, and plea of guilty has been entered which is claimed to be involuntary, trial court erred in refusing to permit withdrawal of such plea. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

Trial court properly denied defendant's motion to withdraw his plea of guilty to charge of obtaining money under false pretenses, and circumstances did not compel a finding that plea was not the product of a voluntary, intelligent choice, it appearing that trial court had previously denied defendant's motion for change of venue, that the defendant was unable to pay counsel, and that there had been lengthy voir dire examination of jurors prior to entry of the guilty plea. *State v. Turner*, 95 Idaho 206, 506 P.2d 103 (1973).

The withdrawal of a guilty plea is a discretionary matter with the trial court and that discretion should be liberally exercised. *State v. Jackson*, 96 Idaho 584, 532 P.2d 926 (1975), overruled on other grounds *State v. Dopp*, 124 Idaho 482, 861 P.2d 51 (1993).

In denying defendant's motion to withdraw his guilty pleas, the trial court reviewed defendant's written application to enter the guilty pleas, the transcript of the hearing at which the trial court accepted the pleas, and defendant's affidavit and letter; the trial court found that defendant was thoroughly advised of his rights and the consequences of his pleas, that he understood the consequences of the pleas, and that there was a factual basis for the pleas; the trial court concluded that defendant entered the pleas freely, voluntarily, and intelligently; therefore, the trial court properly found that defendant had not shown a just reason to withdraw his pleas. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

Collateral References. Advice of counsel, plea of guilty without. 149 A.L.R. 1403.

and 14 are compiled as this section and § 19-2511, respectively.

Cited in: *State v. Dawe*, 31 Idaho 796, 177 P. 393 (1918).

ANALYSIS

Collateral matters.
Corpus delicti.
In general.
Lesser offenses.

Collateral Matters.

Whether charge on which defendant was on trial had theretofore been presented to and ignored by grand jury is not question for jury's determination and trial court properly sustained objection to such evidence. *State v. Wilson*, 41 Idaho 598, 242 P. 787 (1925).

Corpus Delicti.

A defendant's not guilty plea places in issue every material allegation made in the indictment including that of the corpus delicti of the crime. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

In General.

A plea of not guilty puts in issue every

material allegation of the information and it is incumbent upon the state to prove defendant's guilt beyond a reasonable doubt. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947).

Lesser Offenses.

Plea of not guilty put in issue every essential element, not only felony charged, but of lesser offenses included therein as well. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

A plea of not guilty to a charge that a killing was wilful, deliberate and premeditated, and that it was committed in the perpetration of, or attempt to perpetrate, robbery controverts the fact of the robbery or attempted robbery. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947).

19-1716. Evidence admissible under plea of not guilty. — All matters of fact tending to establish a defense other than former conviction or acquittal, or once in jeopardy, may be given in evidence under the plea of not guilty. [Cr. Prac. 1864, § 300; R.S., R.C., & C.L., § 7759; C.S., § 8883; I.C.A., § 19-1616.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Insanity.

While the defense of insanity may be

proven under a plea of not guilty, all persons are presumed sane and it was not error to refuse to give a requested instruction on insanity as a defense where there was no evidence tending to support such a defense presented at the trial. *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

19-1717. What is not a former acquittal. — If the defendant was formerly acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense. [I.C., § 19-1717 as added by 1972, ch. 336, § 7, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 301; R.S., R.C., & C.L., § 7760; C.S., § 8884; I.C.A., § 19-1617, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 7, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 6 of S.L. 1972, ch. 336 is compiled as § 19-1432 and § 8 is compiled as §§ 19-2104 — 19-2109, 19-2111 — 19-2114 and 19-2116.

Dismissal of Original Action.

Where the prosecutor, in order to circumvent a ruling reducing the charge against a defendant from second-degree murder to voluntary manslaughter, moved to dismiss the original action and then filed a second complaint for second-degree murder, the defendant's rights under this section were not violated since the section specifically contemplates dismissal of a proceeding in order to bring higher charges. *Stockwell v. State*, 98 Idaho 797, 573 P.2d 116 (1977).

19-1718. What is a former acquittal. — Whenever the defendant is acquitted on the merits he is acquitted of the same offense, notwithstanding

any defect in form or substance in the indictment on which the trial was had. [I.C., § 19-1718, as added by 1972, ch. 336, § 7, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 302; R.S., R.C., & C.L., § 7761; C.S., § 8885; I.C.A., § 19-1618, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 7, effective April 1, 1972, in the same words as

the section prior to its repeal.

Section 6 of S.L. 1972, ch. 336 is compiled as § 19-1432 and § 8 is compiled as §§ 19-2104 — 19-2109, 19-2111 — 19-2114 and 19-2116.

Cited in: State v. Gutke, 25 Idaho 737, 139 P. 346 (1914).

19-1719. Conviction or acquittal bars included offenses. — When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment, the conviction, acquittal or jeopardy is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense included therein, of which he might have been convicted under that indictment. [I.C., § 19-1719, as added by 1972, ch. 336, § 7, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 303; R.S., R.C., & C.L., § 7762; C.S., § 8886; I.C.A., § 19-1619 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 1 in the same words as the section prior to its repeal.

Section 6 of S.L. 1972, ch. 336 is compiled as § 19-1432 and § 8 is compiled as §§ 19-2104 — 19-2109, 19-2111 — 19-2114 and 19-2116.

Cited in: State v. Gutke, 25 Idaho 737, 139 P. 346 (1914); State v. Campbell, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988).

ANALYSIS

Double jeopardy.
Included offense.

Double Jeopardy.

Although introduction of evidence of a percentage likelihood of intoxication based solely upon a horizontal gaze nystagmus (HGN) test did not constitute prosecutorial misconduct warranting declaration of mistrial or dismissal, the dismissal of charges after jeopardy had attached prevented retrial under constitutional prohibitions against double jeopardy. State v. Stevens, 126 Idaho 822, 892 P.2d 889 (1995).

Where defendant was charged with a single crime of possession of a controlled substance with intent to deliver subject to an enhanced penalty, this section did not apply. State v. Ayala, 129 Idaho 911, 935 P.2d 174 (Ct. App. 1996).

Defendant's argument that her prior conviction pursuant to her guilty plea, vacated on

appeal because the indictment was jurisdictionally defective for failing to allege an essential element of the offense, triggered double jeopardy protection was overruled, and defendant's conviction of felony injury to a child was affirmed because a defendant who procured a judgment against her upon an indictment to be set aside could be tried anew upon the same or upon another indictment for the same offense of which she had been convicted. Idaho Code § 19-1719 did not bar a second prosecution where an initial conviction was reversed on appeal due to a jurisdictional deficiency in the charging document, and Idaho Code § 19-3902 on its face did not purport to apply to the opening of a new criminal case after a conviction had been vacated on appeal. State v. Byington, — Idaho —, 81 P.3d 421 (Ct. App. 2003).

Included Offense.

It is clear that a defendant may not be convicted of both a greater and lesser included offense. State v. McCormick, 100 Idaho 111, 594 P.2d 149 (1979).

Collateral References. Second trial of member of association for same offense. 1 A.L.R. 431.

Acquittal on charge as to one as bar to charge as to the other, where one person is killed or assaulted by acts directed at another. 2 A.L.R. 606.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial. 4 A.L.R. 1266.

Acquittal or conviction of offense during commission of which homicide is committed as bar to prosecution for homicide. 11 A.L.R.3d 834.

19-1720. Refusal to answer. — If the defendant refuses to answer the indictment by demurrer or plea, a plea of not guilty must be entered. [Cr. Prac. 1864, § 304; R.S., R.C., & C.L., § 7763; C.S., § 8887; I.C.A., § 19-1620.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Refusal to plead after demurrer is overruled, § 19-1710.

Cited in: In re Carpenter, 88 Idaho 567, 401 P.2d 800 (1965).

In General.

In prosecution for injury to a public jail, trial court was bound to enter a plea of not guilty on behalf of defendant who refused to plead to the information. State v. Ash, 94 Idaho 542, 493 P.2d 701 (1972).

CHAPTER 18

REMOVAL OF ACTION BEFORE TRIAL

SECTION.

- 19-1801. Ground for removal.
- 19-1802. Form of application — Hearing in absence of defendant.
- 19-1803. Order of removal.
- 19-1804. Transfer of cause.
- 19-1805. Removal of defendant.
- 19-1806. Proceedings after removal.
- 19-1807. Certification of costs.
- 19-1808. Removal on application of state.
- 19-1809. Removal on application of state — Form of application.
- 19-1810. Removal on application of state — Order.

SECTION.

- 19-1811. Removal on application of state — Transfer of cause.
- 19-1812. Removal on application of state — Removal of defendant.
- 19-1813. Removal on application of state — Proceedings after transfer.
- 19-1814. Removal on application of state — Certificate of costs.
- 19-1815. Removal on application of state — Appeal from order denying application.
- 19-1816. Impaneling jury from another county.

19-1801. Ground for removal. — A criminal action, prosecuted by indictment, may be removed from the court in which it is pending, on the application of the defendant, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending. [Cr. Prac. 1864, § 305; R.S., R.C., & C.L., § 7768; C.S., § 8888; I.C.A., § 19-1701.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Change of venue, I.C.R. 21, 22. Transfer from county for plea and sentence, I.C.R. 20.

Cited in: State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979).

ANALYSIS

Action not removed.
Appellate review.
— Factors considered.
Basis of motion.
Conflicting affidavits.

Discretion of court.
Failure to move.
Motion by court.
Prejudice against defendant.
Publicity.

Action Not Removed.

Refusal of a change of venue is largely discretionary with the trial court, and refusal of such change is not ground for a reversal of conviction, where it manifestly appears that defendant had a fair and impartial trial, and that no trouble was experienced in securing jury. State v. Gilbert, 8 Idaho 346, 69 P. 62 (1902); State v. McClurg, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937).

The trial court did not abuse its discretion in denying defendant's motion for a change of venue supported by affidavits that defen-

dant's reputation in the county was so unfavorable that he could not have a fair trial there, where the only juror that knew defendant by his nickname was excused and the voir dire examination of the jury established that none of the jurors knew of any stigma attaching to such nickname. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Where there was extensive pretrial publicity, over a two-year period, which implicated defendant in murder, but the reports contained only dispassionate and objective factual accounts of events then occurring, and where neither the state nor the defense exercised all of its peremptory challenges and no unusual difficulty was experienced in selecting the jury, the defendant was not denied a fair trial and the trial court did not abuse its discretion in denying a motion for change of venue. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

Where, on voir dire, most jurors indicated they knew only that it was a controversial murder case, and all of them indicated that they had formed no opinion on the guilt or innocence of the defendant, there was nothing in the record to indicate that the defendant did not receive a fair trial or that there was any difficulty in selecting a jury; thus, there was no error in the refusal of the trial court to change the venue of the trial to a place acceptable to defendant. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985). See *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Where no affidavits indicating prejudice or an absence of prejudice in the community were submitted, each juror was extensively questioned to determine the degree of his exposure to pretrial publicity, defendant did not challenge for cause any of the jurors finally selected, and defendant did not use all of his peremptory challenges, the district court did not err in denying defendant's motion for a change of venue. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986).

Where most of the jury panel was largely unfamiliar with the facts of the case, none of the jurors were challenged for cause, the defense counsel did not exercise all of her peremptory challenges, and all of the jurors who were finally selected stated they had formed no opinion and could set aside anything they had heard and base their verdict only on the evidence at trial, there was no difficulty in selecting the jury; therefore, the trial court did not abuse its discretion in denying the defendant's motion for change of venue. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

The decision as to whether to grant a motion for change of venue lies within the dis-

cretion of the trial court. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

The judge acted within his sound discretion by denying the motion for a change of venue, where the defendant presented no affidavits demonstrating community prejudice arising from media coverage, the record contained no expression by the defense of dissatisfaction with the final 12 jurors selected, and the bulk of media coverage occurred within two months of the shootings, while the trial did not commence until nearly a year had elapsed. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Defendants did not present a prima facie showing of a violation of the "fair-cross-section" requirement of the sixth amendment and the trial court did not abuse its discretion in denying the motion for change of venue. *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

Because it did not appear from the record that there was any difficulty in selecting a jury and the record did not contain copies of the articles from the news releases or the composite so the court could evaluate their prejudicial impact, the district court did not err in denying defendant's motion for change of venue. *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995).

Appellate Review.

—Factors Considered.

When reviewing a judge's denial of a motion to change venue, the appellate court independently examines the record to determine whether there was a "reasonable likelihood" that pretrial publicity adversely affected juror impartiality; among the factors considered are the existence of affidavits indicating prejudice, or lack of prejudice, in the community where the defendant was tried; testimony at voir dire as to whether any jurors had formed an opinion of the defendant's guilt or innocence based on pretrial publicity; whether the defendant challenged for cause any of the jurors finally selected; the nature and content of the pretrial publicity; the length of time elapsed between the pretrial publicity and the trial; and any assurances given by the jurors themselves concerning their impartiality. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Basis of Motion.

Motion for change of venue must be predicated upon facts existing at time the motion is made. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894).

Where motion for change of place of trial, once overruled, is renewed at subsequent term, several months after that at which such

motion was overruled, it will not be presumed, in absence of any showing to that effect, that the same conditions still existed. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894).

Conflicting Affidavits.

Application for change of venue on ground of popular prejudice was properly denied where the affidavits as to whether defendant could have a fair trial or not were about equally divided. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

When state makes application for change of venue, defendant may make counter showing by affidavit. *State v. Miles*, 43 Idaho 46, 248 P. 442 (1926).

Discretion of Court.

Where evidence in support of motion is conflicting, decision of trial court will not be reversed on appeal. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924); *State v. McLennan*, 40 Idaho 286, 231 P. 718 (1925); *State v. Breyer*, 40 Idaho 324, 232 P. 560 (1925).

A criminal defendant may seek a change of venue under this section or I.C.R. 21 if he believes a fair and impartial trial cannot be had in the county where the indictment is pending. The trial court can transfer the case to another county if satisfied that a fair and impartial trial cannot be had; this decision rests within the sound discretion of the trial court. *State v. Sanger*, 108 Idaho 910, 702 P.2d 1370 (Ct. App. 1985).

Failure to Move.

Failure of defendant's counsel to move for change of venue is not ground for his discharge on a writ of habeas corpus where there is no showing that members of the jury were not fair or that the verdict was reached by bias or prejudice. *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966).

Motion by Court.

In a criminal action, the court can change venue only on the application of either the defendant or the state and not on its own motion. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Harmless error occurred without prejudice to any of defendant's rights where trial court, on its own motion, changed venue in criminal action and court in county to which case was venued, on motion of defendant, transferred case back to the original county. *State v. Ash*, 94 Idaho 542, 493 P.2d 701 (1972).

Prejudice Against Defendant.

It is not sufficient merely to show that great prejudice exists against accused. It must appear that prejudice against him is so great as

to prevent him from receiving fair and impartial trial. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924); *State v. McLennan*, 40 Idaho 286, 231 P. 718 (1925); *State v. Breyer*, 40 Idaho 324, 232 P. 560 (1925).

Publicity.

Publicity itself does not require a change of venue. *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

Defendant's motion for a change of venue in a murder prosecution on the ground that prejudicial news publicity prior to his trial deprived him of a fair and impartial trial was properly denied where news stories regarding the murder contained only factual accounts of events that were occurring in the investigation with no editorial comments or other opinions. *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975), cert. denied, 423 U.S. 1089, 96 S. Ct. 881, 47 L. Ed. 2d 99 (1976).

When a trial judge finds a reasonable likelihood that qualitative or quantitative elements of pretrial publicity have affected the impartiality of prospective jurors, the constitutional balance swings in favor of assuring a fair trial; the judge should continue the case until the impact of publicity abates or should transfer the case to another county where publicity has been less pervasive. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

The question posed by a motion to change venue is whether a "reasonable likelihood" exists that pretrial publicity has affected the impartiality of prospective jurors. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Impartiality of the jury may be affected adversely by the quality or the quantity of pretrial media coverage. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Collateral References. 21 Am. Jur. 2d, Criminal Law, §§ 517 — 537.

22 C.J.S., Criminal Law, §§ 177 — 195.

Dismissal, nolle prosequi, or mistrial after change of venue in criminal case, as affecting jurisdiction or power of courts of respective districts as to subsequent proceedings. 18 A.L.R. 714.

Withdrawal or modification of order granting change of venue, power as to. 59 A.L.R. 362.

Pretrial publicity in criminal case as ground for change of venue. 33 A.L.R.3d 17.

State's right to change of venue. 46 A.L.R.3d 295.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — modern view. 6 A.L.R.4th 802; 18 A.L.R. Fed. 393.

19-1802. Form of application — Hearing in absence of defendant.

— The application must be made in open court and in writing, verified by the affidavit of the defendant, a copy of which must be served upon the prosecuting attorney at least one (1) day before the application is made. Whenever the affidavit shows that the defendant can not safely appear in person to make the application, because the popular excitement against him is so great as to endanger his personal safety, and such statement is sustained by other testimony, the application may be made by counsel, and heard and determined in the absence of the defendant, though he is indicted for felony, and has not at the time of such application been arrested, or given bail, or been arraigned, or pleaded or demurred to the indictment. [Cr. Prac. 1864, § 306; R.S., R.C., & C.L., § 7769; C.S., § 8889; I.C.A., § 19-1702.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Counter affidavits.

Noncompliance.

Presumptions.

Counter Affidavits.

Prosecution may file counter affidavits in opposition to those filed by defendant. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894).

Defendant may make counter showing by affidavit. *State v. Miles*, 43 Idaho 46, 248 P. 442 (1926).

Noncompliance.

Where the application was not made in writing and it was not verified by an affidavit

of the defendant, a copy of which should have been served upon prosecuting attorney at least one day before the application was made, defense counsel's motion for change of venue due to the prejudice in the county was incorrect for the noncompliance with the statute. *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

Presumptions.

Fact that affidavits in support of motion for change of venue filed at one term of court showed a condition of affairs under which defendant could not procure an impartial trial, does not raise a presumption that the same condition of affairs continued at a succeeding term to which the case was adjourned without objection, and at which motion was renewed. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894).

19-1803. Order of removal. — If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection. [Cr. Prac. 1864, § 307; R.S., R.C., & C.L., § 7770; C.S., § 8890; I.C.A., § 19-1703.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Discretion of Court.

Application for change of venue is addressed to the discretion of trial court, and it is not error to overrule same when based upon the unsupported affidavit of defendant. *State v. St. Clair*, 6 Idaho 109, 53 P. 1 (1898).

19-1804. Transfer of cause. — The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings and proceedings in the action, including the

undertakings for the appearance of the defendant and of the witnesses. [Cr. Prac. 1864, § 308; R.S., R.C., & C.L., § 7771; C.S., § 8891; I.C.A., § 19-1704.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1805. Removal of defendant. — If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed. [Cr. Prac. 1864, § 309; R.S., R.C., & C.L., § 7772; C.S., § 8892; I.C.A., § 19-1705.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1806. Proceedings after removal. — The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, upon application of the prosecuting attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained. The costs accruing upon such removal and trial are a charge against the county in which the indictment was found. [Cr. Prac. 1864, §§ 310, 674; R.S., R.C., & C.L., § 7773; C.S., § 8893; I.C.A., § 19-1706.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Steers, 12 Idaho 174, 85 P. 104 (1962).

19-1807. Certification of costs. — The clerk of the court in the county to which such action is, or may be, removed must certify the amount of said costs to the auditor of the proper county, which must be allowed and paid as other county charges. [Cr. Prac. 1864, § 675; R.S., R.C., & C.L., § 7774; C.S., § 8894; I.C.A., § 19-1707.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1808. Removal on application of state. — The district courts of this state, within their respective districts, are hereby empowered to change the place of trial in criminal cases, other than misdemeanors, upon the application of the state, on the relation of the county attorney of the county in which any indictment or information may be filed, or upon the relation of

any attorney duly and especially appointed to prosecute said cause, such application to be sustained by the affidavits of at least two (2) resident taxpayers in the county where the offense is alleged to have been committed, on the ground that a fair and impartial trial cannot be had in the county where the criminal act is alleged to have been committed. [1907, p. 168, § 1; reen. R.C. & C.L., § 7775; C.S., § 8895; I.C.A., § 19-1708.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931); State v. Ash, 94 Idaho 542, 493 P.2d 701 (1972).

ANALYSIS

Constitutionality.
Counter affidavits.

Constitutionality.

This section is not unconstitutional as violation of Const., art. 1, § 7, since right of trial

by jury in county where offense was committed is conditioned upon possibility of fair and impartial trial in that county. State v. Miles, 43 Idaho 46, 248 P. 442 (1926).

Counter Affidavits.

Owing to similarity of provisions where change of venue is sought by defendant or by state and that state should be considered as any other party, counter showing by affidavits can be made by defendant where prosecution seeks change of venue. State v. Miles, 43 Idaho 46, 248 P. 442 (1926).

Collateral References. State's right to change of venue in criminal case. 46 A.L.R.3d 295.

19-1809. Removal on application of state — Form of application. — Such application must be made in open court and in writing, verified by the affidavit of the relator, a copy of which must be served upon the defendant or his attorney at least one (1) day before the application is made. [1907, p. 168, § 2; reen. R.C. & C.L., § 7776; C.S., § 8896; I.C.A., § 19-1709.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931).

19-1810. Removal on application of state — Order. — If the court is satisfied, from the facts set forth in such application and affidavit, that a fair and impartial trial cannot be had, an order must be made for the removal of the action to the proper court of a county free from a like objection. [1907, p. 168, § 3; reen. R.C. & C.L., § 7777; C.S., § 8897; I.C.A., § 19-1710.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931).

19-1811. Removal on application of state — Transfer of cause. — The order of removal must be entered upon the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings and

proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses. [1907, p. 168, § 4; reen. R.C. & C.L., § 7778; C.S., § 8896; I.C.A., § 19-1711.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931).

19-1812. Removal on application of state — Removal of defendant. — If the defendant is in custody, the order must direct his removal, and he must be forthwith removed by the sheriff of the county where he is imprisoned to the custody of the sheriff of the county to which the action is removed. [1907, p. 168, § 5; reen. R.C. & C.L., § 7779; C.S., § 8899; I.C.A., § 19-1712.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1813. Removal on application of state — Proceedings after transfer. — The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, upon application of the county attorney or the relator, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained. The costs accruing upon such removal and trial are a charge against the county from which such criminal action was removed. [1907, p. 168, § 6; reen. R.S. & C.L., § 7779a; C.S., § 8900; I.C.A., § 19-1713.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931).

19-1814. Removal on application of state — Certificate of costs. — The clerk of the court in the county to which said action is, or may be, removed must certify the amount of said costs to the auditor of the proper county, which must be allowed and paid as other county charges. [1907, p. 168, § 7; reen. R.C. & C.L., § 7779b; C.S., § 8901; I.C.A., § 19-1714.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. McClurg, 50 Idaho 762, 300 P. 898 (1931).

19-1815. Removal on application of state — Appeal from order denying application. — The sufficiency, in both law and fact, of the

application and supporting affidavits may be reviewed by the Supreme Court on appeal from an order of the district court denying such application, and such appeal may be taken by the state on the relation of the county attorney of the county in which such application is made, or of any other attorney duly appointed and acting in the prosecution of such cause, and the procedure governing such appeal shall be, as near as may be, the same as provided by law for appeals in other criminal cases. [1907, p. 168, § 8; reen. R.C. & C.L., § 7779c; C.S., § 8902; I.C.A., § 19-1715.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Miles*, 43 Idaho 46, 248 P. 442 (1926).

ANALYSIS

Habeas corpus.

Review of defendant's application.

Habeas Corpus.

Failure of defendant's counsel to move for a change of venue upon his request is not

ground for his discharge on a writ of habeas corpus where he failed to appeal on such ground. *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966).

Review of Defendant's Application.

Order denying defendant's application for change of venue is only reviewable on appeal from final judgment. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Order denying defendant's application for change of venue only reviewable on appeal from final judgment. *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966).

19-1816. Impaneling jury from another county. — (a) As an alternative to entering the order of removal provided in the preceding sections of this chapter, the court may instead enter an order directing that jurors be impaneled from the county to which venue would otherwise have been transferred, if it finds:

1. That a fair and impartial jury cannot be impaneled in the county where the criminal complaint, information or indictment is filed;
2. That it would be more economical to transport the jury than to transfer the pending action; and
3. That justice will be served thereby.

(b) The jury shall be summoned and impaneled as if the trial were to take place in the county where the jury was summoned. Thereafter, the jury shall be transported for purpose of the trial to the county in which the complaint, information or indictment is filed.

(c) All court costs incurred under this section shall be paid by the county where the complaint, information or indictment is filed.

(d) The provisions of this section do not affect the power of the court to order a change of venue. [I.C., § 19-1816, as added by 1983, ch. 17, § 1, p. 51.]

Cited in: *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

Proper Selection.

The district court did not violate a constitutional right or abuse its discretion by select-

ing a jury from another county to sit in a lewd conduct case where, contrary to defendant's assertion, the state did move for the change of jury selection. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

CHAPTER 19

MODE OF TRIAL — FORMATION OF TRIAL JURY — POSTPONEMENT OF TRIAL

SECTION.

- 19-1901. Issue of fact defined.
- 19-1902. Trial by jury.
- 19-1903. Presence of defendant.
- 19-1904. Additional jurors.
- 19-1905. Jury to be formed as in civil actions.

SECTION.

- 19-1906. Preparation of calendar.
- 19-1907. Order of trying cases.
- 19-1908. Time to prepare for trial.
- 19-1909. Trial may be postponed for cause.

19-1901. Issue of fact defined. — An issue of fact arises:

1. Upon a plea of not guilty.
2. Upon a plea of a former conviction or acquittal of the same offense.
3. Upon a plea of once in jeopardy. [Cr. Prac. 1864, § 311; R.S., R.C., & C.L., § 7780; C.S., § 8903; I.C.A., § 19-1801.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Trial by jury, jurors, I.C.R. 23, 24.

Cited in: State v. Chambers, 9 Idaho 673, 75 P. 274 (1904).

ANALYSIS

Former acquittal.
Once in jeopardy.

Former Acquittal.

Judgment of conviction can not be sustained unless jury has passed on plea of former acquittal adversely to defendant. State v. Gutke, 25 Idaho 737, 139 P. 346 (1914).

It is incumbent upon defendant to adduce some evidence in support of his plea of former conviction or acquittal before he is entitled to have jury pass on it. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

Where issue raised by plea of former acquittal involves only question of law and such question is determined adversely to defendant, trial court may properly withdraw question from jury or instruct jury to find against defendant on his plea. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

Whether plea of former conviction or acquittal raises issue of law or fact depends upon circumstances of case and should be determined by rules and principles applicable to issues generally. State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

Once in Jeopardy.

Plea of once in jeopardy raises an issue of fact under this section and is not demurrable.

State v. Crawford, 32 Idaho 165, 179 P. 511 (1919).

Motion by defendant in arrest of judgment in second trial based on double jeopardy, in that court in first trial dismissed hung jury without defendant or counsel being present, was properly denied, since motion was not timely, as it should have been filed at beginning of second trial. State v. Davis, 72 Idaho 115, 238 P.2d 450 (1951).

Collateral References. 21 Am. Jur. 2d, Criminal Law, § 1 et seq.

47 Am. Jur. 2d, Jury, § 1 et seq.

22 C.J.S., Criminal Law, § 1 et seq.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 A.L.R.2d 1291.

Attorneys, exclusion from jury list in criminal cases. 32 A.L.R.2d 890.

Right to jury trial as violated by consolidated trial upon several indictments or informations against same accused, over his objection. 59 A.L.R.2d 841, 846.

Statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 84 A.L.R.2d 1288; 15 A.L.R.4th 1127; 88 A.L.R.4th 711.

Indoctrination by court of person summoned for jury service as violation of right to jury trial. 89 A.L.R.2d 197, 215.

Statutes reducing number of jurors as violative of right to trial by jury. 47 A.L.R.3d 895.

Validity of jury selection as affected by accused absence from conducting of procedures for selection and impaneling of final jury panel for specific case. 33 A.L.R.4th 429.

Right of accused in state criminal trial to insist, over objection of prosecutor's or court's objection on trial by court without a jury. 37 A.L.R.4th 304.

Taking and use of trial notes by jury. 36 A.L.R.5th 255.

19-1902. Trial by jury. — Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases by the consent of both parties expressed in open court and entered in the minutes. In case of misdemeanor the jury may consist of six (6) or any number less than six (6) upon which the parties may agree in open court. There shall be no right to trial by jury for an infraction punishable only by a penalty not to exceed one hundred dollars (\$100) and no imprisonment. [R.S., § 7781; am. 1890-1891, p. 165, § 1; reen. 1899, p. 110, § 1; reen. R.C. & C.L., § 1781; C.S., § 8904; I.C.A., § 19-1802; am. 1965, ch. 80, § 1, p. 130; am. 1982, ch. 353, § 8, p. 874; am. 2000, ch. 69, § 1, p. 152.]

Legislative Intent. Section 1 of S.L. 1982, ch. 353 read: "By the enactment of Chapter 223, Laws of 1981, the state made a dramatic move to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice. This chapter has not yet gone into effect, since it was deliberately enacted with an effective date clause of July 1, 1982. This was done to allow those officials concerned with the administration and enforcement of the law to have time to review and study its provisions.

"It has now come to our attention that some adjustments to Chapter 223 are in order, and that other equally vital changes need to be made in other sections of the law. It is the intent of this bill to provide a means to accomplish this. This bill repeals outright several sections of Chapter 223, in order that the Idaho Code provisions amended by such sections might be left in place; this bill repeals several sections of existing Idaho Code provisions; this bill replaces some of these repealed sections; and this bill adds new sections and makes several amendments in order to make the entire concept a viable instrument. And finally, this bill would delay the effective date of Chapter 223 from July 1, 1982 to March 1, 1983, so that all of the needed changes, revisions and amendments can function as an integrated whole."

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 7 and 9 at S.L. 1982, ch. 353 are compiled as §§ 18-113A and 19-3901, respectively.

Section 42 of S.L. 1982, ch. 353 as amended by § 2 of S.L. 1983, ch. 2 provided that this section should become effective July 1, 1983.

Cross ref. Five-sixths verdict in cases of misdemeanor, Const., art. 1, § 7.

Juveniles, violent offenses, controlled sub-

stances violations near schools and offenders, § 20-509.

Waiver of trial by jury, Const., art. 1, § 7.

Cited in: *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

ANALYSIS

Charge to jury.

Former acquittal.

Nonpetty misdemeanor.

Once in jeopardy.

Plea of guilty.

"Trial" defined.

Trial de novo.

Verdict of jury.

Charge to Jury.

Trial of a Nez Perce Indian for misdemeanor of illegally possessing game during a closed season for which defendant could not be legally convicted did not require the court to charge the jury on all matters of law pertaining to a criminal trial where the district court advised the jury to acquit the defendant. *State v. Powauke*, 78 Idaho 257, 300 P.2d 488 (1956).

Former Acquittal.

Judgment of conviction can not be sustained unless jury has passed on plea of former acquittal adversely to defendant. *State v. Gutke*, 25 Idaho 737, 139 P. 346 (1914).

Defendant must adduce some evidence in support of his plea of former conviction or acquittal before he is entitled to have jury pass on it. *State v. Douglass*, 35 Idaho 140, 208 P. 236 (1922).

Taking from jury question of former conviction as an element of offense of being persistent violator of the prohibition law is prejudicial. *State v. Dunn*, 44 Idaho 636, 258 P. 553 (1927).

Nonpetty Misdemeanor.

Conviction of a nonpetty misdemeanor of offense by a unanimous six-member jury does not violate the Sixth Amendment. *State v. Ritchie*, 114 Idaho 528, 757 P.2d 1247 (Ct. App. 1988).

Once in Jeopardy.

Plea of once in jeopardy presents an issue of fact which must be tried by jury and is not demurrable. *State v. Crawford*, 32 Idaho 165, 179 P. 511 (1919).

Plea of Guilty.

If accused person, with full knowledge of his constitutional right to trial by jury, enters plea of guilty and presents no issue of fact for trial, there can be no trial; in that event conviction of accused, by his own admission, takes the place of verdict of jury. In re *Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

"Trial" Defined.

"Trial" means an issue of fact presented by plea of accused, in which event, if offense charged be a felony, a jury cannot be waived; in such a case court is without jurisdiction to try such issue of fact and there can be no conviction except upon trial by jury. In re *Dawson*, 20 Idaho 178, 117 P. 696, 35 L.R.A. (n.s.) 1146 (1911).

Trial De Novo.

Defendant convicted in municipal court of driving car on city street while intoxicated in violation of city ordinance on appeal to district court was entitled to trial by jury, since

defendant was entitled to a trial de novo as though started or commenced in district court, and in district court the defendant is entitled to jury trial. *Miller v. Winstead*, 75 Idaho 262, 270 P.2d 1010 (1954).

Verdict of Jury.

Trial for felony must be by jury of twelve and result in unanimous verdict. *State v. Scheminisky*, 31 Idaho 504, 174 P. 611 (1918).

Verdict by five-sixths of jury is confined to misdemeanor cases and such limitation cannot be disregarded by court. *State v. Scheminisky*, 31 Idaho 504, 174 P. 611 (1918); *State v. Jutila*, 34 Idaho 595, 202 P. 566 (1921).

There is no merit in contention that a five-sixths verdict may be returned where charge is felony and conviction is for included misdemeanor. *State v. Jutila*, 34 Idaho 595, 202 P. 566 (1921).

The authority of the jury as to questions of fact is as absolute as the authority of the court with respect to questions of law. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947).

Collateral References. Exclusion of public during criminal trial. 48 A.L.R.2d 1436; 55 A.L.R.4th 1170; 55 A.L.R.4th 1196; 70 A.L.R.4th 632.

19-1903. Presence of defendant. — If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant. [R.S., R.C., & C.L., § 7782; C.S., § 8905; I.C.A., § 19-1803.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916); *State v. Poynter*, 34 Idaho 504, 205 P. 561 (1921); *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931).

ANALYSIS

Impaneling of jury.

Temporary absence.

Impaneling of Jury.

Defendants have the right to be personally present at each stage of their trial, including the impaneling of the jury. *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

Absence of defendants at time of impaneling of jury was prejudicial error which re-

quires new trial where record plainly showed the error was not cured, expressly or impliedly waived, subsequently ratified, or waived by obstreperous courtroom conduct. *State v. Carver*, 94 Idaho 677, 496 P.2d 676 (1972).

Temporary Absence.

While this section is mandatory, yet a brief, temporary, and voluntary absence of defendant from courtroom during the argument of counsel and ruling on motion for a view, is not such violation of the statute as to be ground for reversal. *State v. McGinnis*, 12 Idaho 336, 85 P. 1089 (1906).

Collateral References. Absence of defendant and his counsel, effect of discharge of jury in. 150 A.L.R. 764.

Exclusion or absence of defendant, pending trial of criminal case, from court-room, or from conference between court and attorneys, during argument on question of law. 85 A.L.R.2d 1111; 23 A.L.R.4th 955.

19-1904. Additional jurors. — A court may direct that one (1) or more jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. All jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges prior to deliberations. At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot. Those removed by lot may be discharged after the jury retires to consider its verdict. If more than one (1) additional juror is called, each party is entitled to two (2) peremptory challenges in addition to those otherwise allowed by law; provided however, that if only one (1) additional juror is called, each party shall be entitled to one (1) peremptory challenge in addition to those otherwise provided by law. [I.C., § 19-1904, as added by 2002, ch. 94, § 10, p. 256.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

A former § 19-1904, which comprised C.S., § 8905-A, as added by 1923, ch. 32, § 1, p. 34; am. 1929, ch. 141, § 1, p. 250; I.C.A., § 19-

1804, was repealed by S.L. 2002, ch. 94, § 9.

Section 9 of S.L. 2002, ch. 94, contains a repeal and § 11 is compiled as § 19-2126.

Sec. to sec. ref. This section is referred to in §§ 19-2515 and 19-2515A.

Cross ref. Constitution and number of jurors generally, § 2-105.

Collateral References. Alternate jurors, statutory provision for. 84 A.L.R.2d 1288; 15 A.L.R.4th 1127; 88 A.L.R.4th 711.

19-1905. Jury to be formed as in civil actions. — Trial juries for criminal actions are formed in the same manner as trial juries in civil actions. [Cr. Prac. 1864, § 313; R.S., R.C., & C.L., § 7787; C.S., § 8906; I.C.A., § 19-1805.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Mattson v. Bryan*, 92 Idaho 587, 448 P.2d 201 (1968); *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

ANALYSIS

Impaneling of juries.
Voir dire examination.

Impaneling of Juries.

If this section was intended to apply to the impaneling of trial juries, it was repealed to

that extent by § 2-507 (repealed), providing that in criminal cases the jury must be impaneled as provided by the statutes relating thereto. *People v. Kuok Wah Choi*, 2 Idaho (Hasb.) 90, 6 P. 112 (1885).

Voir Dire Examination.

The scope of a voir dire examination of a venireman is a matter which rests in the sound discretion of the trial court. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

It is improper to ask venireman whether he would be governed by an assumed principle of law if so instructed by the court, as the juror is bound under the law to take the instructions of the court as to the law of the case. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

19-1906. Preparation of calendar. — The clerk must prepare a calendar of all criminal actions pending in the court, enumerating them according to the date of the filing of the indictment, specifying opposite the title of each action whether it is for a felony or a misdemeanor, and whether the defendant is in custody or on bail. [Cr. Prac. 1864, § 314; R.S., R.C., & C.L., § 7788; C.S., § 8907; I.C.A., § 19-1806.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1907. Order of trying cases. — The issues on the calendar must be disposed of in the following order, unless upon application of either party, for good causes shown by affidavit, and upon two (2) days' notice to the opposite party, with service of a copy of the affidavit in support of the application, the court shall direct an indictment to be tried out of its order:

1. Indictments for felony, when the defendant is in custody.
2. Indictments for misdemeanor, when the defendant is in custody.
3. Indictments for felony, when the defendant is on bail.
4. Indictments for misdemeanor, when the defendant is on bail. [Cr. Prac. 1864, § 315; R.S., R.C., & C.L., § 7789; C.S., § 8908; I.C.A., § 19-1807.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-1908. Time to prepare for trial. — After his plea the defendant is entitled to at least two (2) days to prepare for trial. [Cr. Prac. 1864, § 316; R.S., R.C., & C.L., § 7790; C.S., § 8909; I.C.A., § 19-1808.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Garner, 122 Idaho 371, 834 P.2d 888 (Ct. App. 1992).

ANALYSIS

Construction.

Waiver of time allowance.

Construction.

Under this section, defendant is entitled to two days after plea, but not necessarily to two days after cause is set for hearing, in which to prepare for trial. State v. Steers, 12 Idaho 174, 85 P. 104 (1906).

The statute was sufficiently complied with where defendant's counsel were employed 23 days before the complaint was filed in the lower court and 27 days before defendant was bound over to the district court. State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1937).

Waiver of Time Allowance.

The statutory two-day provision was waived when the attorney for the defendant stated he was ready for trial, after the information had first been read to defendant on February 3rd and he had on request been given statutory time to move against the information until the 7th and on May 23rd the information was again read to defendant and upon being called to state his plea and refusal to so plead to the charge the court directed the clerk to enter a plea of not guilty for the defendant. State v. Cronk, 78 Idaho 585, 307 P.2d 1113 (1957).

Where a defendant's attorney had moved unsuccessfully for a continuance in the course of a proceeding to consider the sanity defense which was held on the same day as the trial, and where the defendant had no time to prepare for trial after learning that the sanity defense would be presented to the jury, the defense attorney's statement that he was ready to proceed to trial did not constitute a waiver of the right to a two-day delay. State v. Cook, 98 Idaho 686, 571 P.2d 332 (1977).

19-1909. Trial may be postponed for cause. — When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day of the same or of the next term. [Cr. Prac. 1864, § 317; R.S., R.C., & C.L., § 7795; C.S., § 8910; I.C.A., § 19-1809.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Richardson*, 95 Idaho 446, 511 P.2d 263 (1973).

ANALYSIS

Absence of witnesses.
Discretion of court.
Right to postponement.

Absence of Witnesses.

It is not error to deny continuance in criminal case where prosecuting attorney admits that if witnesses were present they would testify as set forth in affidavit for a continuance. *State v. St. Clair*, 6 Idaho 109, 53 P. 1 (1898).

To entitle defendant to postponement of trial on the ground of absence of witness, he must show what he expects to prove by such witness; that such evidence is material to his defense; that such evidence is true; that witness is not absent by his procurement or with his consent; that he has used due diligence to procure the presence of said witness at the trial, and failed to do so; and that there is a reasonable probability that he can and will procure the attendance of said witness at the next term of court. *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

It is not error to overrule application for continuance on the ground of absence of witnesses, where it is not shown that the evidence of absent witness can be furnished at a future term of court, or what it is proposed to prove by the absent witnesses. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904); *State v. Allen*, 20 Idaho 263, 117 P. 849 (1911).

There is no abuse of discretion in denying application for continuance where party applying fails to show that if continuance should be granted he could procure material evidence

tending to establish his defense, which he could not reasonably expect to produce unless such continuance should be granted. *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911).

Affidavit for continuance on the ground of absence of witnesses must allege what is expected to be proved by the witness, that the evidence is material to his defense and that it is true, that witness was not absent by his procurement or with his consent, that he used due diligence to procure the witness and that there is reasonable probability that he could procure the witness at the next term of court. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Van Vlack*, 57 Idaho 316, 65 P.2d 736 (1937).

Discretion of Court.

Application for continuance is addressed to the sound judicial discretion of court, which will not be reviewed unless abused. *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 P. 39 (1888); *State v. St. Clair*, 6 Idaho 109, 53 P. 1 (1898); *State v. Rice*, 7 Idaho 762, 66 P. 87 (1901); *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904); *State v. Wetter*, 11 Idaho 433, 83 P. 341 (1905); *State v. Steers*, 12 Idaho 174, 85 P. 104 (1906); *State v. Cannon*, 26 Idaho 182, 140 P. 963 (1914).

There was no abuse of discretion in refusing to grant defendant a continuance to give his attorney time to prepare for trial where the attorney was employed on June 29 and the trial started July 30, where defendant alleged in his motion no facts requiring a greater length of time. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Right to Postponement.

Defendant is not entitled to continuance as a matter of right, but must make statutory showing. *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

CHAPTER 20

CHALLENGING THE JURY

SECTION.

- 19-2001. Kinds of challenge.
- 19-2002. Defendants must join in challenge.
- 19-2003. Panel defined.
- 19-2004. Challenge to panel defined — Who may take.
- 19-2005. Challenge to panel — Grounds.
- 19-2006. Challenge to panel — When and how taken.
- 19-2007. Exception to challenge.
- 19-2008. Overruling or allowance of exception.

SECTION.

- 19-2009. Denial of challenge — Trial.
- 19-2010. Challenge for bias of officers.
- 19-2011. Discharge of jury on sustaining challenge.
- 19-2012. Instruction as to right of challenge.
- 19-2013. Challenge to individual juror — Kinds.
- 19-2014. Time for challenge.
- 19-2015. Peremptory challenge defined.
- 19-2016. Number of peremptory challenges.

SECTION.

- 19-2017. Challenge for cause defined.
- 19-2018. General causes of challenge.
- 19-2019. Particular causes of challenge.
- 19-2020. Grounds of challenge for implied bias.
- 19-2021. Exemption not ground for challenge.
- 19-2022. Challenge for bias — How stated.
- 19-2023. Exceptions to challenge.

SECTION.

- 19-2024. Trial of challenge.
- 19-2025. Examination of challenged juror.
- 19-2026. Examination of witnesses.
- 19-2027. Disposition of challenge for bias.
- 19-2028. Exhaustion of challenges for cause.
- 19-2029. Order of challenges for cause.
- 19-2030. Alteration of peremptory challenges.

19-2001. Kinds of challenge. — A challenge is an objection made to trial jurors and is of two kinds:

1. To the panel.

2. To an individual juror. [Cr. Prac. 1864, § 318; R.S., R.C., & C.L., § 7815; C.S., § 8911; I.C.A., § 19-1901.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Trial jurors, I.C.R. 24.

ANALYSIS

Representation of racial and ethnic groups.
Scope of voir dire examination.

Representation of Racial and Ethnic Groups.

Defendants, who were American Indians, were not denied a fair trial because American Indians were underrepresented on the jury panel from which the jury that tried them was selected, because the guarantee of the Sixth Amendment is not that each racial or ethnic group present in the community be represented on each jury panel, but only that there be a fair cross-section of the community. *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

Scope of Voir Dire Examination.

It was error for the trial court to sustain the objections to the questions to the jurors with reference to their "prejudice against a man who may take a drink of intoxicating liquor" and with reference to any religious prejudices they might entertain. It is true that no possible answer the juror might have made to this line of questions would have been ground for challenge to the juror. The answer would have afforded counsel information which might have enabled him to more intelligently exercise his peremptory challenges. For this reason a wide latitude is allowed in the examination of jurors on their voir dire. *State v. Miller*, 60 Idaho 79, 88 P.2d 526 (1939).

Collateral References. 47 Am. Jur. 2d, Jury, §§ 225 — 338.

24 C.J.S., Criminal Law, §§ 1867, 1900.

50A C.J.S., Juries, §§ 182, 342, 354, 356, 357, 359 — 369, 371, 372, 410 — 417, 419 — 421, 423 — 433, 435 — 438, 440 — 442, 462 — 467, 470 — 483, 485 — 490, 500.

Use of intoxicating liquor by jurors: Criminal cases. 7 A.L.R. 1040; 21 A.L.R. 1335; 41 A.L.R. 989; 75 A.L.R. 544; 120 A.L.R. 170; 148 A.L.R. 1051.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 A.L.R.2d 1291.

Acceptance of juror, peremptory challenge after. 3 A.L.R.2d 499.

Exclusion of women from grand or trial jury panel in criminal case as ground for reversal of conviction. 9 A.L.R.2d 661.

Failure in criminal case to disclose previous jury service within disqualifying period as ground for reversal. 13 A.L.R.2d 1482.

Interrogation or poll of jurors, during criminal trial, as to whether they have read newspaper articles pertaining to alleged crime or the trial. 15 A.L.R.2d 1152.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 A.L.R.2d 1187.

Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel. 76 A.L.R.2d 678.

Effect of allowing excessive number of peremptory challenges. 95 A.L.R.2d 957.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 A.L.R.2d 7.

Religious belief as ground for exemption or excuse from jury service. 2 A.L.R.3d 1392.

Juror's presence at or participation in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant. 6 A.L.R.3d 519.

Number of peremptory challenges allowed

in criminal case, where there are two or more defendants tried together. 21 A.L.R.3d 725.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury. 24 A.L.R.3d 1236.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 A.L.R.3d 1012.

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case — Post-Witherspoon cases. 39 A.L.R.3d 550.

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. 43 A.L.R.3d 1081.

Membership in racially biased or prejudiced organization as proper subject for voir dire inquiry or ground for challenge. 63 A.L.R.3d 1052.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such

attorney, as ground for new trial or mistrial. 64 A.L.R.3d 126.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family. 66 A.L.R.4th 509.

Similarity of occupation between proposed juror and alleged victim of crime as affecting juror's competency. 71 A.L.R.3d 974.

Law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases. 72 A.L.R.3d 958.

Use of peremptory challenge to exclude from jury persons belonging to race or class. 79 A.L.R.3d 14; 20 A.L.R.5th 398.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 A.L.R.3d 869.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. 86 A.L.R.3d 571.

Trial jurors as witnesses in same state court or related case. 86 A.L.R.3d 781.

19-2002. Defendants must join in challenge. — When several defendants are tried together they cannot sever their challenges, but must join therein. [Cr. Prac. 1864, § 319; R.S., R.C., & C.L., § 7816; C.S., § 8912; I.C.A., § 19-1902.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Mitchell*, 36 Idaho 724, 214 P. 217 (1923).

19-2003. Panel defined. — The panel is a list of jurors returned by a sheriff to serve at a particular court or for the trial of a particular action. [Cr. Prac. 1864, § 320; R.S., R.C., & C.L., § 7817; C.S., § 8913; I.C.A., § 19-1903.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2004. Challenge to panel defined — Who may take. — A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party. [Cr. Prac. 1864, § 321; R.S., R.C., & C.L., § 7818; C.S., § 8914; I.C.A., § 19-1904.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Heitman v. Morgan*, 10 Idaho 562, 79 P. 225 (1905); *State v. Jordan*, 19 Idaho 192, 112 P. 1049 (1911); *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

19-2005. Challenge to panel — Grounds. — A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on the intentional omission of the sheriff to summon one (1) or more of the jurors drawn. [Cr. Prac. 1864, § 322; R.S., R.C., & C.L., § 7819; C.S., § 8915; I.C.A., § 19-1905.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Construction.
Failure to challenge individual jurors.
Invalid objections.
Material departures.
Quashing the panel.
Valid objection.

Construction.

This section will not be so technically construed that inadvertent misspelling of name of juror would be reversible error, especially where name was spelled properly in commissioner's list and was actually summoned, after which he reported for jury service. *State v. McLennan*, 40 Idaho 286, 231 P. 718 (1925).

Failure to Challenge Individual Jurors.

Where defendant did not challenge any juror for cause nor exercise all of her peremptory challenges, she failed to exhaust the means available to her to exclude unacceptable jurors, and could not claim error in the trial court denial of her motion to dismiss the entire jury panel. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336, cert. denied, 461 U.S. 934, 103 S. Ct. 2101, 77 L. Ed. 2d 308 (1983).

Invalid Objections.

Objection to the panel of a jury in criminal prosecution on the ground that some of the jurors were summoned under special venire on Sunday is properly overruled. *State v. Gilbert*, 8 Idaho 346, 69 P. 62, 1 Ann. Cas. 280 (1902).

Fact that a person may be exempt from jury service, but is drawn for such service, is not a cause of challenge to the panel. *State v. Silva*, 21 Idaho 247, 120 P. 835 (1912).

Disqualification of individual juror for any cause is not ground for challenge to panel. *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

Inclusion of names of women among those selected by board of county commissioners for jury service is not ground for challenge to

panel. *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

An oral request that jury panel be dismissed and a new panel be drawn because members thereof had tried two similar cases was properly denied. *State v. Conner*, 59 Idaho 695, 89 P.2d 197 (1939).

Material Departures.

Material departures are only such as affect the substantial rights of defendant in securing an impartial jury. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Errors complained of in challenge to jury, including failure of clerk to enter exception to challenge in minutes, were not "material departures," prejudicing defendant in murder case. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Quashing the Panel.

Where no appeal has been taken from order of board of county commissioners in selecting and listing names of persons to serve for the year as jurors, and no direct attack has been made on ground of fraud in the selection, district court is without jurisdiction to quash panel and discharge jury on motion of prosecuting attorney where such motion is not made in any case pending and no litigant is complaining, and neither commissioners nor county representing them are made parties to the proceeding. *Heitman v. Morgan*, 10 Idaho 562, 79 P. 225 (1905).

On motion to quash a jury panel the burden of substantial actual or presumptive prejudice to the rights of defendant rests on the moving party and must be established by a preponderance of the proofs. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

Question of whether jury lists had been selected and prepared as required by law, could be raised by a motion to quash the panel. *State v. Walters*, 61 Idaho 341, 102 P.2d 284 (1940).

Valid Objection.

The intentional omission of the sheriff to summon a juror duly drawn is a good cause of challenge to the panel of the trial jury. *People v. Armstrong*, 2 Idaho (Hasb.) 298, 13 P. 342 (1887).

19-2006. Challenge to panel — When and how taken. — A challenge to the panel must be taken before a juror is sworn, and must be in writing, and must plainly and distinctly state the facts constituting the ground of challenge. [Cr. Prac. 1864, § 323; R.S., R.C., & C.L., § 7820; C.S., § 8916; I.C.A., § 19-1906.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Jordan*, 19 Idaho 192, 112 P. 1049 (1911); *State v. Conner*, 59 Idaho 695, 89 P.2d 197 (1939); *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

ANALYSIS

Burden of proof.

Construction.

Disqualifying as witness.

Failure to challenge individual jurors.

Timeliness.

Waiver.

Written challenges.

Burden of Proof.

A party who contends purposeful discrimination occurred in the selection of a jury panel bears the burden of proving that contention. *State v. Ruybal*, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982).

Construction.

This provision is mandatory. *State v. Scoble*, 28 Idaho 721, 155 P. 969 (1916).

A defendant who desires to interpose a challenge to a jury panel for implied bias of the officer who summoned them, must take his challenge in writing prior to the time any of the jurors are sworn. *State v. Scoble*, 228 Idaho 721, 155 P. 969 (1916).

Disqualifying as Witness.

If a sheriff is disqualified for serving a special venire by virtue of being a witness, his deputies are also disqualified, but fact that deputies are disqualified, does not disqualify the sheriff. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Failure to Challenge Individual Jurors.

Where defendant did not challenge any juror for cause nor exercise all of her peremptory challenges, she failed to exhaust the means available to her to exclude unacceptable jurors, and could not claim error in the

trial court denial of her motion to dismiss the entire jury panel. *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336, cert. denied, 461 U.S. 934, 103 S. Ct. 2101, 77 L. Ed. 2d 308 (1983).

Timeliness.

The denial of the challenge to the panel, made after the jury had been selected and sworn, was proper. *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

Section 2-213 requires that a motion challenging the composition of a jury be made within seven days after the discovery of grounds therefor and, in any event before the jury is sworn to try the case; accordingly, where the defendant waited until the appeal of his conviction to make his first objection to the selection of the jury, the objection was untimely since the defendant did not use reasonable diligence in asserting his rights in the trial court. *State v. Ruybal*, 102 Idaho 885, 643 P.2d 835 (Ct. App. 1982).

Waiver.

Where defendant and his counsel knew before trial that sheriff would be a state witness, and failed to challenge panel on that ground, such objection is waived. *State v. Steen*, 29 Idaho 337, 158 P. 499 (1916).

Written Challenges.

Court did not err, where it issued a special venire for jurymen, and defendant challenged the panel on the ground that prosecutor had stricken name of sheriff from the information as a witness in order that he could serve the special venire, since challenge of defendant was not in writing, and where it further appeared that sheriff's name had been stricken prior to service on the venire, and that sheriff had in fact not testified as a witness. *State v. Shaw*, 69 Idaho 365, 207 P.2d 540 (1949).

Where defendant orally moved to quash panel on ground that special venire had been summoned by sheriff, who was a witness in the case, court properly overruled motion, as statute requires challenge to the panel to be in writing. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

19-2007. Exception to challenge. — If the sufficiency of the facts alleged as ground of the challenge is denied, the adverse party may except to the challenge. The exception need not be in writing, but must be entered

on the minutes of the court, and thereupon the court must proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true. [Cr. Prac. 1864, §§ 324, 325; R.S., R.C., & C.L., § 7821; C.S., § 8917; I.C.A., § 19-1907.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *People v. Armstrong*, 2 Idaho (Hasb.) 298, 13 P. 342 (1887).

Sufficiency of the Facts.

An exception to a challenge in our criminal practice is practically a demurrer thereto, and admits the facts stated therein. *Hopkins v. Utah N. Ry.*, 2 Idaho 300, 13 P. 343 (1887).

19-2008. Overruling or allowance of exception. — If, on the exception, the court finds the challenge sufficient, it may, if justice require it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge. If the exception is allowed the court may, in like manner, permit an amendment of the challenge. [Cr. Prac. 1864, § 326; R.S., R.C., & C.L., § 7822; C.S., § 8918; I.C.A., § 19-1908.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Effect of Sustaining Exception.

Where defendant's challenge does not set forth sufficient facts to sustain it, it is not necessary to try such challenge after excep-

tion thereto by state. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Exception to challenge to jury panel amounts to a demurrer thereto and admits the facts therein. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

19-2009. Denial of challenge — Trial. — If the challenge is denied, the denial may be oral, and must be entered on the minutes of the court, and the court must proceed to try the question of fact; and upon such trial, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. [Cr. Prac. 1864, §§ 327, 328; R.S., R.C., & C.L., § 7823; C.S., § 8919; I.C.A., § 19-1909.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2010. Challenge for bias of officers. — When the panel is formed, or in part formed, from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of any bias of the officer who summoned them, which would be good ground of challenge to a juror. Such challenge must be made in the same form, and determined in the same manner, as if made to a juror. [Cr. Prac. 1864, § 329; R.S., R.C., & C.L., § 7824; C.S., § 8920; I.C.A., § 19-1910.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Demurrer to challenge.

Sheriffs.

Witness for prosecution.

Demurrer to Challenge.

The exception made by the state to the challenge made by appellant to the special jury panel was in effect a demurrer to the challenge. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Sheriffs.

Court did not err, where court issued a special venire for jurymen, and defendant challenged the panel on the ground that prosecutor had stricken name of sheriff from the information as a witness in order that he could serve the special venire, since challenge of defendant was not in writing, and it further appeared that sheriff's name had been stricken prior to service on the venire, and that sheriff had in fact not testified as a

witness. *State v. Shaw*, 69 Idaho 365, 207 P.2d 540 (1949).

If a sheriff is disqualified for serving a special venire by virtue of being a witness, his deputies are also disqualified, but fact that deputies are disqualified, does not disqualify the sheriff. *State v. Baldwin*, 69 Idaho 459, 208 P.2d 161 (1949).

Where defendant orally moved to quash panel on ground that special venire had been summoned by sheriff, who was a witness in the case, court properly overruled motion, as statute requires challenge to the panel to be in writing. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Witness for Prosecution.

In connection with § 19-2020, challenge to special panel may be taken for the implied bias of officer summoning the same, when it appears that he is a witness for the prosecution. *State v. Jordan*, 19 Idaho 192, 112 P. 1049 (1911).

Where defendant did not interpose challenge to panel because of the implied bias of sheriff by reason of being a witness for the prosecution, failure of trial court to dismiss jury was not error. *State v. Steen*, 29 Idaho 337, 158 P. 499 (1916).

19-2011. Discharge of jury on sustaining challenge. — If, either upon an exception to the challenge or a denial of the facts, the challenge is allowed, the court must discharge the jury, so far as the trial of the indictment in question is concerned. If it is disallowed, the court must direct the jury to be impaneled. [Cr. Prac. 1864, § 330; R.S., R.C., & C.L., § 7825; C.S., § 8921; I.C.A., § 19-1911.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2012. Instruction as to right of challenge. — Before a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so before the jury is sworn. [Cr. Prac. 1864, § 331; R.S., R.C., & C.L., § 7826; C.S., § 8922; I.C.A., § 19-1912.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Necessity of compliance.

Presumption of compliance.

Necessity of Compliance.

Where defendant is represented by counsel on the trial and exercises his right to chal-

challenge jurors, he is not prejudiced by neglect of trial court to advise him, in accordance with the statute, that, if he intends to challenge an individual juror, he must do so before the jury is sworn. *State v. Smith*, 30 Idaho 337, 164 P. 519 (1917).

Presumption of Compliance.

Record need not affirmatively show that

19-2013. Challenge to individual juror — Kinds. — A challenge to an individual juror is either:

1. For cause; or,
2. Peremptory. [Cr. Prac. 1864, § 332; R.S., R.C., & C.L., § 7827; C.S., § 8923; I.C.A., § 19-1913.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983); *State v. Hoffman*, 109

defendant was instructed as to his right to challenge juror, as required by this section, presumption being that the statute was complied with. *State v. Suttles*, 13 Idaho 88, 88 P. 238 (1907); *State v. O'Brien*, 13 Idaho 112, 88 P. 425 (1907).

Idaho 127, 705 P.2d 1082 (Ct. App. 1985).

Nature of Exception.

Exception to a challenge is practically demurrer thereto, and admits facts stated therein; consequently, if challenge is good in point of law, it should be sustained over exception. *People v. Armstrong*, 2 Idaho (Hasb.) 298, 13 P. 342 (1887).

19-2014. Time for challenge. — It must be taken before the jury is sworn to try the cause. [Cr. Prac. 1864, § 333; R.S., R.C., & C.L., § 7828; C.S., § 8924; I.C.A., § 19-1914.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Impaneling a Jury.

This, in connection with other relevant sections of the criminal practice act, contemplate that in trials for murder, after juror has been called, he shall remain under control of court until he is rejected as incompetent, or, if accepted, until termination of the trial. This justifies the practice of requiring parties to exercise all their challenges, either peremp-

tory or for cause, before another juror is called. But it is proper, in the discretion of the court, to modify this practice by permitting the clerk to draw twelve names from the box before any challenges are interposed, and after these are passed upon for cause, to allow others to be drawn to take the place of those excused, and thus permit defendant to pass upon and examine all those called, before exercising his peremptory challenges. But in case of recess or adjournment, the peremptory challenges should be exercised or waived upon all those passed for cause, and those accepted should be sworn to try the cause, and should remain under the control of court. *People v. Kuok Wah Choi*, 2 Idaho (Hasb.) 90, 6 P. 112 (1885).

19-2015. Peremptory challenge defined. — A peremptory challenge can be taken by either party and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him. [Cr. Prac. 1864, § 334; R.S., R.C., & C.L., § 7829; C.S., § 8925; I.C.A., § 19-1915.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. McKeehan*, 91 Idaho 808,

430 P.2d 886 (1967); *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982); *State*

v. Mitchell, 104 Idaho 493, 660 P.2d 1336 (1983).

19-2016. Number of peremptory challenges. — If the offense charged is punishable with death or with imprisonment in the state prison for life, the defendant is entitled to ten (10) and the state to ten (10) peremptory challenges. On a trial for any other offense the defendant is entitled to six (6) and the state six (6) peremptory challenges. [Cr. Prac. 1864, § 335; R.S., § 7830; am. 1907, p. 171, § 1; reen. R.C., & C.L., § 7830; C.S., § 8926; I.C.A., § 19-1916.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Browne*, 4 Idaho 723, 44 P. 552 (1896); *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967); *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

ANALYSIS

Additional challenges.

Harmless error.

Joint defendants.

Jury presumed satisfactory.

Multiple charges.

Additional Challenges.

If defendant failed to exercise his ten peremptory challenges, he cannot claim error in trial court's action in refusing to grant his motion for additional peremptory challenges. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

Harmless Error.

In trial for lewd conduct with a minor under the age of 16 where juror expressed belief that defendant was guilty by virtue of the fact that he was on trial and would have to present evidence to dissuade jury of his guilt, but upon subsequent questioning indicated his willingness to follow the instructions of the court, whereupon defendant challenged juror

for cause but such motion was denied and defendant then used a peremptory challenge to remove him, since defendant made no showing in motion for new trial that he was prejudiced by being required to use peremptory challenge to remove such juror and did not suggest that any other of the jurors who remained on the panel were not impartial or were biased, the error, if any, was harmless. *State v. Ramos*, 119 Idaho 568, 808 P.2d 1313 (1991).

Joint Defendants.

Defendants jointly indicted are not entitled to exercise right of peremptory challenge separate and apart from one another; only ten peremptory challenges jointly exercised are allowable. *State v. Mitchell*, 36 Idaho 724, 214 P. 217 (1923).

Jury Presumed Satisfactory.

In intoxicating liquor case, where defendant exercised only three of his six peremptory challenges, it will be presumed jury was satisfactory. *State v. McMahon*, 37 Idaho 737, 219 P. 603 (1923).

Multiple Charges.

Defendant was not entitled to 20 peremptory challenges rather than ten as provided by this section where he was charged with two murders in separate counts of the same information. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

Collateral References. Prejudice in excusing juror as affected by peremptory challenges. 96 A.L.R. 514.

19-2017. Challenge for cause defined. — A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

1. General — That the juror is disqualified from serving in any case; or,
2. Particular — That he is disqualified from serving in the action on trial.

[Cr. Prac. 1864, § 336; R.S., R.C., & C.L., § 7831; C.S., § 8927; I.C.A., § 19-1917.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Territory v. Evans*, 2 Idaho

(Hasb.) 651, 23 P. 232 (1890); *State v. McKeethan*, 91 Idaho 808, 430 P.2d 886 (1967); *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982); *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983).

ANALYSIS

Voir dire examination.

Waiver.

Voir Dire Examination.

Scope of voir dire examination is within the

discretion of the trial judge, and his ruling will not be disturbed except for manifest abuse of discretion. *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969).

Waiver.

Defendant cannot urge as error on appeal refusal of court to allow challenge for cause, when he does not exercise all his peremptory challenges. *State v. Fondren*, 24 Idaho 663, 135 P. 265 (1913).

19-2018. General causes of challenge. — General causes of challenge are:

1. A conviction of felony.
2. A want of any of the qualifications prescribed by law to render a person a competent juror.
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as render him incapable of performing the duties of a juror. [Cr. Prac. 1864, § 337; R.S., R.C., & C.L., § 7832; C.S., § 8928; I.C.A., § 19-1918.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-2403.

Cited in: *Territory v. Evans*, 2 Idaho (Hasb.) 651, 23 P. 232, 7 L.R.A. 646 (1890).

Failure to Challenge.

A defendant who fails to challenge for cause can not complain that he was forced to use a peremptory challenge to remove such juror. *State v. Cosler*, 39 Idaho 519, 228 P. 277 (1924).

Collateral References. Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. 75 A.L.R.5th 295.

19-2019. Particular causes of challenge. — Particular causes of challenge are of two kinds:

1. For such a bias as, when the existence of the fact is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
2. For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality, and which is known in this code as actual bias. [Cr. Prac. 1864, § 338; R.S., R.C., & C.L., § 7833; C.S., § 8929; I.C.A., § 19-1919.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-2403.

Cited in: *Territory v. Evans*, 2 Idaho (Hasb.) 651, 23 P. 232, 7 L.R.A. 646 (1890); *State v. Santana*, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000).

ANALYSIS

Demurrer to challenge.
Examination not in record.
Exclusion of jurors upheld.

Ill feeling toward counsel.
 Juror not excluded.
 Professional jurors.

Demurrer to Challenge.

The exception made by the state to the challenge made by appellant to the special jury panel was in effect a demurrer to the challenge. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

Examination Not in Record.

Where it does not appear that entire examination of challenged juror appears in transcript, rulings of trial court will not be presumed erroneous. *State v. Murray*, 43 Idaho 762, 254 P. 518 (1927).

Exclusion of Jurors Upheld.

Exclusion of two potential jurors in a capital case was not an abuse of discretion where one juror was planning a move out of state, and the other had a father in prison for murdering several members of his family, which led potential juror to advocate public stoning of defendants, charging 50 cents per rock. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

Ill Feeling Toward Counsel.

Fact that juror entertains ill feeling toward counsel on one side or the other is not ground for challenge for actual bias. The bias must be directed at the case or either of the parties. *State v. Thomey*, 61 Idaho 60, 97 P.2d 659 (1939).

Juror Not Excluded.

The trial court did not err by failing to declare a mistrial when juror failed to reveal during voir dire by the prosecuting attorney that his wife had been sexually molested as a child, where juror was thoroughly questioned by the court and by counsel concerning any possible effect that his wife's molestation would have on his consideration of the case and juror repeatedly stated that he would be fair and did not think his wife's molestation would affect his judgment in any way. *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

Where juror failed to acknowledge that he knew defense witness, but where the last contact between the two had been about six years prior and defendant could show no actual prejudice to his case, defendant was not entitled to challenge that juror for cause. *State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Ct. App. 1997).

Professional Jurors.

The conclusion of bias resting on the assertion that sheriff called "professional" jurors which was attempted to be grounded on an affidavit alleging an investigation made some six months previously having to do with the manner in which the sheriff selected special veniremen cannot be treated as proof that any such situation existed at the time of appellant's trial setting. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

19-2020. Grounds of challenge for implied bias. — A challenge for implied bias may be taken for all or any of the following causes and for no other:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant.

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family or boarder or lodger of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted, or in his employment on wages.

3. Being a party adverse to the defendant in a civil action or having complained against or been accused by him in a criminal prosecution.

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment.

5. Having served on a trial jury which has tried another person for the offense charged in the indictment.

6. Having been one of a jury formerly sworn to try the same charge, and whose verdict was set aside or which was discharged without a verdict after

the case was submitted to it, or being a witness for the prosecution, or subpoenaed as such.

7. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.

9. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror. [Cr. Prac. 1864, § 339; R.S., R.C., & C.L., § 7834; C.S., § 8930; I.C.A., § 19-2020.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Jordan, 19 Idaho 192, 112 P. 1049 (1911); State v. Clark, 27 Idaho 48, 146 P. 1107 (1915); State v. Steen, 29 Idaho 337, 158 P. 499 (1916); State v. Baldwin, 69 Idaho 459, 208 P.2d 161 (1949); State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974); State v. Johns, 112 Idaho 873, 736 P.2d 1327 (1987).

ANALYSIS

Construction.

Death qualifying jury.

Demurrer to challenge.

Form of challenge.

Grounds of challenge.

Jailor and inmate.

Members of same church.

Questions on voir dire.

Relationship to victim.

Relationship with prosecutor.

Construction.

This section does not provide for exclusions based on a challenge for implied bias that are not specifically mentioned, therefore, a jailor in the jail where defendant was housed was not excluded. State v. Luke, 134 Idaho 294, 1 P.3d 795 (2000).

Death Qualifying Jury.

The "death qualifying" jury selection procedure is well established in Idaho and approved in a substantial body of case law from the United States Supreme Court, and the utilization of this procedure by the trial court was not error. State v. Enno, 119 Idaho 392, 807 P.2d 610 (1991).

The record supported a finding that four jurors dismissed for cause where defendant was charged with first degree murder had views on imposition of the death penalty that

would substantially impair the performance of their duties or would interfere with their judgment on the case; each of the jurors stated that they would not return a guilty verdict regardless of the evidence presented because of the potential of a death penalty sentence, indicated that they would have difficulty following the court's instructions concerning intoxication, one indicated earlier that he would have trouble hearing enough evidence to convict someone of first degree murder, and the fourth also specifically indicated earlier in the voir dire process that he could not follow the court's instructions knowing that a possible death sentence could be given. State v. Enno, 119 Idaho 392, 807 P.2d 610 (1991).

Demurrer to Challenge.

The exception made by the state to the challenge made by appellant to the special jury panel was in effect a demurrer to the challenge. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

Form of Challenge.

Specific ground upon which challenge for implied bias is made must be stated, but failure to have such grounds stated, unless prejudicial to defendant, is not ground for reversal. State v. Gordon, 5 Idaho 297, 48 P. 1061 (1897).

Grounds of Challenge.

Prejudice of juror against attorney for defendant in a criminal case is not ground of challenge for actual bias. State v. Gordon, 5 Idaho 297, 48 P. 1061 (1897).

When relation of client and attorney exists between one of the jurors and defendant's attorney, it is proper for court to sustain challenge for implied bias. State v. McGraw, 6 Idaho 635, 59 P. 178 (1899).

Under this section a challenge for implied bias may be taken upon ground of being witness for prosecution or subpoenaed as such. State v. Jordan, 19 Idaho 192, 112 P. 1049 (1911).

Where juror has been summoned upon an

open venire by coroner of county, and it appears that he had been summoned upon a previous open venire by sheriff of county, which previous panel had been quashed by court for implied bias of sheriff, such facts are not ground of challenge to the individual juror for implied bias under this section. *State v. Scoble*, 28 Idaho 721, 155 P. 969 (1916).

Prospective juror who has conscientious scruples against death penalty is not qualified to sit as juror where charge is murder in first degree. *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

Implied bias must be directed at the case or either one of the parties, it does not extend to the attorneys. *State v. Thomey*, 61 Idaho 60, 97 P.2d 659 (1939).

A juror was not disqualified by the fact that he was a janitorial employee of the law firm of the prosecuting attorney, as the relationship prohibited by subdivision 2 of this section refers to a relationship with the defendant himself or "the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted" and not with the attorneys. *State v. Cypher*, 92 Idaho 159, 438 P.2d 904 (1968).

Trial court did not err in permitting state to challenge six veniremen for implied bias in trial of defendants for first degree murder where veniremen challenged stated they could not vote for death penalty even though they could and would determine guilt or innocence of defendants. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Trial court did not err in refusing to grant challenge for cause to a juror, despite defendant's argument that such juror's position as county treasurer placed her in an attorney client relationship with prosecutor, since a relationship between a prospective juror and an attorney in the case is not a ground for challenge for implied bias. *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983).

Prior service in a similar case, by itself, will not necessarily result in disqualification based on implied bias. *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987).

The judge committed legal error when he summarily found that the juror should be excused because she was "a juror whose husband at this moment is being prosecuted by the State," a reason not included in the legal grounds for finding implied bias under the inclusive list in this section, but the error was harmless because defendant's due process rights were not affected. *State v. Santana*, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000).

Juror's testimony regarding the ability to stay impartial in a first-degree murder case was accepted by a district court, despite the fact that the juror believed that the person

arrested for the crime of killing a police officer was probably guilty; therefore, the district court did not err by failing to allow a challenge for cause. *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

Jailor and Inmate.

The district court did not abuse its discretion when it allowed a jailor, at the jail in which defendant was held, to sit on the jury after the jailor testified, and the district court found that he did not have a personal relationship with defendant and that he could be fair and impartial throughout the trial. *State v. Luke*, 134 Idaho 294, 1 P.3d 795 (2000).

Members of Same Church.

The magistrate correctly ruled that complained relationship of three prospective jurors who were members of a church over which the prosecutor presided as Bishop was not covered by this section and properly denied the challenge for implied bias. *State v. Bowman*, 124 Idaho 936, 866 P.2d 193 (Ct. App. 1993).

Questions on Voir Dire.

Nature and extent of inquiries permissible on voir dire is largely in discretion of trial court, and will not be reversed save in case of abuse. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

Grounds of challenge are specified in statute and questions on voir dire should be confined to enumerated disqualifications. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

Questions on voir dire directed to juror's knowledge of law and his reaction to legal conclusions should not be allowed. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

Great latitude is allowed in examination on voir dire for purpose of determining whether it is expedient to challenge peremptorily or for express or implied bias. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

Relationship to Victim.

That one of the jurors was related to victim of murder within fourth degree, but did not know it till after the trial, was not error, even though juror was within degree of relationship prohibited by the statute. *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932).

Relationship with Prosecutor.

The court properly exercised its discretion in denying the motion to dismiss the indictment and in ruling that the juror was a proper grand juror. The juror had no relationship with the defendant or the prosecuting attorney who presented the case. The juror's contacts with the deputy prosecuting attorney were properly viewed by the court as not creating bias in the juror. Thus, the defendant was not denied due process. *State v. Bujanda-Velazquez*, 129 Idaho 726, 932 P.2d 354 (1997).

19-2021. Exemption not ground for challenge. — An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted. [Cr. Prac. 1864, § 340; R.S., R.C., & C.L., § 7835; C.S., § 8931; I.C.A., § 19-1921.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Silva, 21 Idaho 247, 120 P. 835 (1912).

19-2022. Challenge for bias — How stated. — In a challenge for implied bias, one or more of the legal causes must be alleged. In a challenge for actual bias, it must be alleged that the juror is biased against the party challenged. In either case the challenge may be oral, but must be entered on the minutes of the court. [Cr. Prac. 1864, § 341; R.S., R.C., & C.L., § 7836; C.S., § 8932; I.C.A., § 19-1922.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Gordon, 5 Idaho 297, 48 P. 1061 (1897); State v. Wilson, 41 Idaho 616, 243 P. 359 (1925).

ANALYSIS

Discretion of court.

Error in ruling on challenge.

Form of challenge.

Discretion of Court.

To sustain challenge for implied bias, one or more of the causes set forth in § 19-2020 must be stated. But while court does not err in overruling challenge, where that is not

done, it ought, where defendant is charged with a serious offense and where great prejudice may exist against him, to be very careful in selection of jury to reject all persons who are actually biased and prejudiced in the matter. State v. Clark, 27 Idaho 48, 146 P. 1107 (1915).

Error in Ruling on Challenge.

Record must show that necessity of accepting other jurors not qualified was created by reason of court's ruling on peremptory challenge, before party can take advantage of error in such ruling. State v. Murray, 43 Idaho 762, 254 P. 518 (1927).

Form of Challenge.

Statutory grounds for challenge should be stated; it is not sufficient to say, "We challenge the juror for cause." State v. Conner, 59 Idaho 695, 89 P.2d 197 (1939).

19-2023. Exceptions to challenge. — The adverse party may except to the challenge in the same manner as to a challenge to the panel, and the same proceedings must be had thereon. The adverse party may also orally deny the facts alleged as the ground of challenge. [Cr. Prac. 1864, § 342; R.S., R.C., & C.L., § 7837; C.S., § 8933; I.C.A., § 19-1923.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2024. Trial of challenge. — If the facts are denied the challenge must be tried by the court. [Cr. Prac. 1864, § 343; R.S., § 7838; am. 1905, p. 9, § 1; reen. R.C. & C.L., § 7838; C.S., § 8934; I.C.A., § 19-1924.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2025. Examination of challenged juror. — Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry. [Cr. Prac. 1864, § 346; R.S., R.C., & C.L., § 7841; C.S., § 8935; I.C.A., § 19-1925.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Shelton, 46 Idaho 423, 267 P. 950 (1928).

ANALYSIS

Duty of defendant's counsel.
Further examination of jurors.

Duty of Defendant's Counsel.

Law requires counsel for defendant, in selecting juror, to try diligently to ascertain his state of mind and his qualification as a juror. If he neglects to do so, defendant can not complain after trial. State v. O'Neil, 24 Idaho 582, 135 P. 60 (1913).

Further Examination of Jurors.

Until the jury is accepted and sworn, it is within the sound discretion of court to permit either the state or defendant to further examine the jurors. State v. Crea, 10 Idaho 88, 76 P. 1013 (1904).

19-2026. Examination of witnesses. — Other witnesses may also be examined on either side, and the rules of evidence applicable to the trial of other issues govern the admission or exclusion of evidence on the trial of the challenge. [Cr. Prac. 1864, § 347; R.S., R.C., & C.L., § 7842; C.S., § 8936; I.C.A., § 19-1926.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2027. Disposition of challenge for bias. — On the trial of a challenge for either implied or actual bias, the court must determine the law and the fact, and must either allow or disallow the challenge, and direct an entry accordingly upon the minutes. [Cr. Prac. 1864, §§ 348, 349; R.S., § 7843; am. 1905, p. 9, § 1; reen. R.C. & C.L., § 7843; C.S., § 8937; I.C.A., § 19-1927.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Discretion of court.
Presumptions.

Discretion of Court.

It is discretionary with court whether or not it will permit challenge to juror to be tried by other evidence than that of juror himself. State v. Shelton, 46 Idaho 423, 267 P. 950 (1928).

Juror's testimony regarding the ability to stay impartial in a first-degree murder case was accepted by a district court, despite the fact that the juror believed that the person arrested for the crime of killing a police officer was probably guilty; therefore, the district

court did not err by failing to allow a challenge for cause. *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

Presumptions.

In absence of showing to contrary, it will be

presumed that defendant offered no witness in support of his challenge and that court was satisfied with examination on voir dire. *State v. Shelton*, 46 Idaho 423, 267 P. 950 (1928).

19-2028. Exhaustion of challenges for cause. — All challenges to an individual juror, except peremptory, must be taken, first by the people, and then by the defendant, and each party must exhaust all his challenges for cause before the other begins. [Cr. Prac. 1864, § 351; R.S., R.C., & C.L., § 7846; C.S., § 8938; I.C.A., § 19-1928.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Exhaustion of Challenges.

It is not error to permit district attorney to exhaust his challenges for cause to each juror before passing such juror to the defense. *State v. Gordon*, 5 Idaho 297, 48 P. 1061 (1897).

19-2029. Order of challenges for cause. — The challenges of either party for cause need not all be taken at once, but they must be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. To the panel.
2. To an individual juror, for a general disqualification.
3. To an individual juror, for an implied bias.
4. To an individual juror, for an actual bias. [Cr. Prac. 1864, § 352; R.S., R.C., & C.L., § 7847; C.S., § 8939; I.C.A., § 19-1929.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2030. Alteration of peremptory challenges. — After the jury is passed for cause, both parties alternately, beginning with the people, may take their peremptory challenges. But no challenge is lost by failure to alternate if the panel is opened by the other party; and each party is entitled to a full panel before exercising a peremptory challenge. Provided, however, in the discretion of the court, the number of jurors who will hear the case, plus a number of jurors representing the total number of possible peremptory challenges, may be called and examined for cause before the parties begin to exercise their peremptory challenges. [Cr. Prac. 1864, § 353; R.S., R.C., & C.L., § 7848; C.S., § 8940; I.C.A., § 19-1930; am. 1986, ch. 202, § 1, p. 505.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Alternation of challenges.
 Procedure for exercising challenges.
 Right of defendant.
 Uniformity in method of selection.

Alternation of Challenges.

Where the statute gives to the state in criminal cases only half the number of peremptory challenges allowed defendant, and requires such challenges to be made alternately, defendant should be required to exercise two peremptory challenges to the state's one. *State v. Browne*, 4 Idaho 723, 44 P. 552 (1896).

Procedure for Exercising Challenges.

Requiring the parties to direct their challenges to the body of 24 instead of to a body of 12, in effect removed the element of chance that the next juror selected would be one who is acceptable and the procedure adopted put both the state and defendant on notice as to who would be sitting on the trial jury, eliminating to a degree this element of chance inherent in the selection of a jury. *State v. Carringer*, 84 Idaho 32, 367 P.2d 584 (1961).

This section provides that by waiving a peremptory challenge in one round, no subsequent challenge is lost, but each successive peremptory challenge must be either exercised or waived by each party in turn. *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

Where the trial judge allowed the state to pass its turn in two rounds of peremptory challenges and then exercise them later, such procedure destroyed the alternation required

by this section. *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

Where jurors are peremptorily challenged, they must be immediately replaced from the jury panel. *State v. Latham*, 98 Idaho 558, 569 P.2d 362 (1977).

Where the method employed by the court with respect to jury selection involved the State exercising its peremptory challenge first on rounds one, two, five, seven and nine and the defendant exercising the first peremptory in rounds three, four, six, eight and ten, although the method utilized by the trial court in this case was unconventional and not a recommended procedure, it did not significantly vary from the regular manner of exercising peremptory challenges sufficient to constitute reversible error; further, no objection was made by either party to the procedure utilized. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

Right of Defendant.

This section prescribing the order in which peremptory challenges should be made was not a mere rule of procedure for the orderly conduct of criminal trials; it was a right secured to the defendant, having at least the semblance of benefit to the accused. *State v. Carringer*, 84 Idaho 32, 367 P.2d 584 (1961).

Uniformity in Method of Selection.

Section 26 of the Idaho Constitution, art. 5, provides for uniformity in operation of laws throughout the state and where the method of selection of a criminal jury was at variance from the statutory requirement, error resulted therefrom. *State v. Carringer*, 84 Idaho 32, 367 P.2d 584 (1961).

CHAPTER 21

TRIAL

SECTION.

- 19-2101. Order of trial.
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SECTION.

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- 19-2126. Custody of jury during trial.
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SECTION.

- 19-2132. Instructions to jury — Requests — Instructions on included offenses.
 19-2133. Retirement of jury — Oath of bailiff.
 19-2134. Commitment of defendant pending trial.
 19-2135. Absence of prosecuting attorney — Appointment of substitute.

19-2101. Order of trial. — The jury having been impaneled and sworn, the trial must proceed in the following order:

1. If the indictment is for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.

2. The prosecuting attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment.

3. The defendant or his counsel may then open the defense and offer his evidence in support thereof.

4. The parties may then respectively offer rebutting testimony only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the prosecuting attorney or other counsel for the people must open, and the prosecuting attorney may conclude, the argument.

6. The judge must then charge the jury if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact; such charge must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally. [Cr. Prac. 1864, § 354; R.S., R.C., & C.L., § 7855; C.S., § 8941; I.C.A., § 19-2001.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Charging the jury, § 19-2132.

Evidence, I.C.R. 26.

Instructions, I.C.R. 30.

Interpreters, I.C.R. 28.

Cited in: *Territory v. Neilson*, 2 Idaho (Hasb.) 614, 23 P. 537 (1890); *State v. Bogris*, 26 Idaho 587, 144 P. 789 (1914); *Ex parte Allen*, 31 Idaho 295, 170 P. 921 (1918); *State v. Scheminisky*, 31 Idaho 504, 174 P. 611 (1918); *State v. Orr*, 53 Idaho 452, 24 P.2d 679 (1933); *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. Powaukee*, 78 Idaho 257,

300 P.2d 488 (1956); *State v. Anspaugh*, 97 Idaho 519, 547 P.2d 1124 (1976); *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

ANALYSIS

Argument.

Instructions to jury.

Reading of indictment and statement of plea.

Rebuttal.

Reduction of instructions to writing.

Special counsel present.

Swearing of witnesses.

Timely objections.

Argument.

District attorney is not required to close the argument in person, but that duty may be left to assistant counsel. *State v. Williams*, 4 Idaho 502, 42 P. 511 (1895).

In a criminal case, the right of argument

contemplates liberal freedom of speech and range of discussion confined only to bounds of logic and reason. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

Where arguments of defendant's counsel were not stricken and jury was not instructed to disregard such argument, any error of the court, in stating that the argument should be confined to the facts, was not prejudicial. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

An accused has the right to have his counsel argue the law in so far as the law is not misstated or inconsistent with the court's instruction. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

The purpose of argument is not limited to a discussion of the facts; defendant has a right to have his counsel discuss the application of the law to the facts shown to exist. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

Defendant's constitutional right to counsel includes right to have counsel make proper arguments to the jury. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

Instructions to Jury.

Court in charging the jury may state the testimony and declare the law. *People v. Bernard*, 2 Idaho (Hasb.) 193, 10 P. 30 (1886).

This section does not conflict with § 19-2123, which prohibits court from charging with respect to matters of fact; court is the judge of whether evidence is sufficient to warrant conviction. *Territory v. Neilson*, 2 Idaho (Hasb.) 614, 23 P. 537 (1890).

Where charge is given orally under subd. 6, the record must show that mutual consent was given to an oral charge. *Territory v. McKern*, 3 Idaho 15, 26 P. 123 (1891).

It is a violation of subd. 6 for court to instruct the jury to acquit; that is a charge as to matters of fact. *State v. Peck*, 14 Idaho 712, 95 P. 515 (1908).

Action of trial court in charging jury before taking of evidence which was not justified by the record was not reversible error where defendant made no objection to departure from statutory procedure. *State v. Spencer*, 74 Idaho 173, 258 P.2d 1147 (1953).

Defendant was not prejudiced by an instruction given by the trial court which assumed a fact in issue since it seemed to indicate that the defendant allegedly used the murder weapon, as the instruction was directed to the issue of intent rather than whether or not the defendant did use the weapon in question, and other instructions informed the jury that the instructions should be considered and construed together. *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970).

A jury instruction which stated that the defendant had been accused by information of

the crime of robbery and that defendant had a preliminary examination before a magistrate did not violate the defendant's right to a presumption of innocence on the argument that the instruction could give a jury the impression that a magistrate had already found defendant guilty of the crime charged, where another instruction cautioned the jury that the fact that defendant had been brought before the court to stand trial on a robbery charge was not evidence of his guilt. *State v. Sharp*, 101 Idaho 498, 616 P.2d 1034 (1980).

Reading of Indictment and Statement of Plea.

Reading of indictment and statement of plea to jury is a formality, and failure to perform these actions is not fatal to conviction in the absence of prejudice. *People v. Ah Hop*, 1 Idaho 698 (1878).

Failure of clerk to read indictment or information, and to state defendant's plea to the jury in a felony case is reversible error. *State v. Chambers*, 9 Idaho 673, 75 P. 274 (1904); *State v. Crea*, 10 Idaho 88, 76 P. 1013 (1904).

While failure of clerk to read indictment or information, and to state defendant's plea to the jury in a felony case is reversible error, where the plea of the defendant was in fact stated to the jury and the stenographer's notes do not show that fact, it may be shown by affidavit. *State v. Lancaster*, 10 Idaho 410, 78 P. 1081 (1904).

Where the record is silent as to whether indictment and plea have been read as required by this section, it will be presumed that the law was complied with. *State v. Lottridge*, 29 Idaho 53, 155 P. 487 (1916).

In the separate trial of one of several defendants, a general objection to reading indictment is insufficient to raise question of the propriety of reading a specific clause respecting the other defendants. *State v. Curtis*, 29 Idaho 724, 161 P. 578 (1916).

Where information was not read, or the defendant's plea was not stated to the jury until after two witnesses had testified for the state, there was no prejudice to the defendant, hence no error results. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

The court erred in not requiring or not having the clerk read the information to the jury and state the plea of the defendant to the jury after they were impaneled and sworn, and the fact that the jurors were present but not impaneled at a time of reading the information would not satisfy the requirement of this section. *State v. Cronk*, 78 Idaho 585, 307 P.2d 1113 (1957).

There is no prejudicial error committed in reiterating in an instruction the charging part of the information without also instructing the jury that the defendant had pleaded not guilty. *State v. Anstine*, 91 Idaho 169, 418 P.2d 210 (1966).

Rebuttal.

By provisions of subd. 4, a large discretion is vested in trial court, and, unless grossly abused, its exercise will not be interfered with upon appeal. *State v. Waln*, 14 Idaho 1, 80 P. 221 (1905); *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925).

Evidence which is not strictly in rebuttal may be admitted, provided defendant is given a fair opportunity to meet it. *State v. Mushrow*, 32 Idaho 562, 185 P. 1075 (1919).

Rebuttal evidence is that which is given by the state to explain, repel, counteract, or disprove evidence introduced by or on behalf of defendant. *State v. Mushrow*, 32 Idaho 562, 185 P. 1075 (1919).

In prosecution for drunk driving state could show that accused was intoxicated on the evening of the day of his arrest on direct examination in chief but it could not do so in rebuttal without showing good reason and furtherance of justice. *State v. Miller*, 60 Idaho 79, 88 P.2d 526 (1939).

Admission or exclusion of evidence on rebuttal rests in the sound discretion of the court. *State v. Hewitt*, 73 Idaho 452, 254 P.2d 677 (1953).

Where defendant was charged with burglary of store in Picabo located on most direct route to Ketchum and defendant testified that he and codefendant did not go through Picabo and that they arrived at Ketchum in mid-afternoon, and there was evidence that they did not arrive at Ketchum until evening, and prosecuting attorney offered to prove by proprietor of the store for the purpose of impeachment that codefendant came into store shortly after 6:00 p.m., the court did not abuse its discretion in admitting testimony as rebuttal, since testimony when considered in its entirety was for purpose of rebuttal and not impeachment, as it disproved not only testimony of defendant that he did not go through Picabo but also testimony that he arrived in Ketchum in the afternoon. *State v. Hewitt*, 73 Idaho 452, 254 P.2d 677 (1953).

Proper rebuttal evidence is that which explains, repels, counteracts or disproves the testimony, facts or evidence introduced by adverse party. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Trial court did not err in denying defendant's motion to strike state's rebuttal of evidence of defendant's sanity, although state had introduced evidence of sanity in its case in chief, where defendant failed to timely object, made no claim or showing of surprise, disadvantage, or lack of preparation, waived his right of surrebuttal, and did not ask for a continuance to enable him to meet the evidence. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Reduction of Instructions to Writing.

Act of stenographic reporter in reducing the charge to writing as it is given to the jury by

court is a sufficient compliance with this section. *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894).

It will be presumed, in the absence of showing to the contrary, that defendant assented to the granting of an oral instruction, and if he desires to raise any question of error in not reducing the charge to writing, the bill of exceptions should show that his charge was given orally without his consent. *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894).

Where court gives his instructions in writing, conviction will not be reversed because court makes a verbal answer to a further question asked him by a juror as to the effect to be given to certain testimony. *State v. McGann*, 8 Idaho 40, 66 P. 823 (1901).

Special Counsel Present.

Presence of special counsel did not offend public policy on the ground that special counsel represented widow of deceased where record did not show that special counsel had been employed to represent widow in civil action based on same facts as those involved in criminal action, and further did not show any civil suit filed by special counsel in behalf of widow against defendant. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

Swearing of Witnesses.

It is not error to swear all the witnesses for the prosecution in a body at commencement of trial. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Timely Objections.

Departure from the statutory procedure set forth in this section is not reversible error, if a party so claiming failed to make timely objection. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Objection that rebuttal witness was testifying to matters not strictly rebuttal, not made at time testimony was introduced but after the jury had heard it in its entirety, was not timely. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Collateral References. 75 Am. Jur. 2d, Trial, § 180-841.

"Falsus in uno, falsus in omnibus," modern view as to propriety and correctness of instructions referable to maximum. 4 A.L.R.2d 1077.

Admissibility and effect of evidence or comments on party's military service or lack thereof. 9 A.L.R.2d 606.

Instruction, in prosecution based on abortion, as to limited effect of evidence of commission of similar crimes by accused. 15 A.L.R.2d 1080, 1113.

Necessity for instructions to jury on question as to who are accomplices, within rule requiring corroboration of their testimony. 19 A.L.R.2d 1352, 1387.

Instructions in prosecution for bribery or accepting bribes as to consideration of evidence tending to show commission of other bribery or acceptance of bribe. 20 A.L.R.2d 1012, 1036.

Instruction as to presumption of continuing insanity in criminal case. 27 A.L.R.2d 121.

Instructions as to entrapment to commit offense with respect to narcotics law. 33 A.L.R.2d 883, 902.

Instructions in robbery prosecution limiting effect of evidence of other robberies. 42 A.L.R.2d 885.

Sufficiency of showing of grounds for admission of deposition in criminal case. 44 A.L.R.2d 768.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed. 44 A.L.R.2d 978.

Physically exhibiting to jury objects or items not introduced as evidence, by prosecuting attorney. 46 A.L.R.2d 1423.

Instructions as to conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged. 47 A.L.R.2d 887, 890.

Duty of trial court to instruct on self-defense, in absence of request by accused. 56 A.L.R.2d 1170.

Effect of failure or refusal of court, in prosecution for assault with intent to commit robbery, to instruct on assault and battery. 58 A.L.R.2d 808.

Right to jury trial as violated by consolidated trial upon several indictments or informations against same accused, over his objections. 59 A.L.R.2d 841, 846.

Instruction, in prosecution for gambling or gambling offense, as to limited effect of evidence of other acts of gambling. 64 A.L.R.2d 823, 846.

Counsel's right in criminal prosecution to argue law or read law books to the jury. 67 A.L.R.2d 245.

Comment by prosecuting attorney on deceased's clothing in homicide prosecution. 68 A.L.R.2d 903, 944.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses. 70 A.L.R.2d 559.

Instruction as to identification of accused by his voice. 70 A.L.R.2d 995, 1019.

Necessity of trial court charged upon motive in homicide case. 71 A.L.R.2d 1025.

Duty to give cautionary instruction against emotional appeal of photograph of corpse in prosecution for homicide. 73 A.L.R.2d 769, 800.

Deaf, mute, or blind person, criminal trial of. 80 A.L.R.2d 1084.

Propriety of criminal trial of one under

influence of drugs or intoxicants at time of trial. 83 A.L.R.2d 1067.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part. 83 A.L.R.2d 1097.

Statute or court rule relating to alternate or additional jurors or substitution of jurors during trial. 84 A.L.R.2d 1288; 15 A.L.R.4th 1127; 88 A.L.R.4th 711.

Instruction as to presumption of deliberation or premeditation from the act of killing. 86 A.L.R.2d 656, 659.

Use of alias of accused in instructions to jury in criminal case as derogatory to reputation and improper. 87 A.L.R.2d 1217.

Instructions in prosecution for criminal conspiracy as to gambling. 91 A.L.R.2d 1148, 1203.

Additional instruction to jury after submission of felony case, in accused's absence. 94 A.L.R.2d 270.

Record as to presence of accused while giving additional instruction to jury after submission of felony case. 94 A.L.R.2d 270, 307.

Lie detector test, propriety and prejudicial effect of comment or evidence as to accused's willingness to take. 95 A.L.R.2d 819.

Instructions as to presumption of deliberation and premeditation from circumstances attending killing. 96 A.L.R.2d 1435.

Propriety and effect of attack on opposing counsel during trial of a criminal case. 99 A.L.R.2d 508.

Comment on accused's failure to testify, by counsel for co-defendant. 1 A.L.R.3d 989.

Unanimity in criminal case where jury can recommend lesser penalty. 1 A.L.R.3d 1461.

Propriety of specific jury instructions as to credibility for accomplices. 4 A.L.R.3d 351.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 A.L.R.3d 723.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 A.L.R.3d 1137.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 A.L.R.3d 1093; 32 A.L.R.4th 774.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification. 24 A.L.R.3d 1261.

Propriety and prejudicial effect of prosecution attorney's arguing new matter or points in his closing argument in criminal case. 26 A.L.R.3d 1409.

Prejudicial effect of holding accused in contempt of court in presence of jury. 29 A.L.R.3d 1399.

Withholding or suppression of evidence by prosecution in criminal case as vitiating con-

viction. 34 A.L.R.3d 16.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice's testimony. 34 A.L.R.3d 858.

Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal. 36 A.L.R.3d 839.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 A.L.R.3d 1012.

Validity and construction of constitution or statute authorizing exclusion of public in sex offense cases. 39 A.L.R.3d 852.

Propriety of reference, in instruction in criminal case, to juror's duty to God. 39 A.L.R.3d 1445.

Right of accused to have press or other media representatives excluded from criminal trial. 49 A.L.R.3d 1007.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 A.L.R.3d 8.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt. 67 A.L.R.3d 988.

Duty of court, in absence of specific request, to instruct on subject of alibi. 72 A.L.R.3d 547.

Power of court to impose standard of personal appearance or attire. 73 A.L.R.3d 353.

Sufficiency of courtroom facilities as affecting rights of accused. 85 A.L.R.3d 918.

Propriety and prejudicial effect of prosecu-

tor's argument to jury indicating his belief or knowledge as to guilt of accused — Modern state cases. 88 A.L.R.3d 449.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen Charge) — Modern cases. 97 A.L.R.3d 96.

Entrapment defense in sex prosecutions. 12 A.L.R.4th 413.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial. 60 A.L.R.4th 1063.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence — modern cases. 70 A.L.R.4th 664.

Propriety of trial court order limiting time for opening or closing argument in criminal case — state cases. 71 A.L.R.4th 200.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal. 81 A.L.R.4th 659.

Modern status of sudden emergency doctrine. 10 A.L.R.5th 680.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 A.L.R.5th 700.

Taking and use of trial notes by jury. 36 A.L.R.5th 255.

19-2102. When order may be departed from. — When the state of the pleadings requires it, or in any other case for good reasons, and in the sound discretion of the court, the order prescribed in the last section may be departed from. [Cr. Prac. 1864, § 355; R.S., R.C., & C.L., § 7856; C.S., § 8942; I.C.A., § 19-2002.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Ayres, 70 Idaho 18, 211 P.2d 142 (1949); State v. Anspaugh, 97 Idaho 519, 547 P.2d 1124 (1976); State v. McLeskey, 138 Idaho 691, 69 P.3d 111 (2003).

ANALYSIS

Charging jury.

Rights of prosecution.

Charging Jury.

Action of trial court in charging jury before taking of evidence which was not justified by the record was not reversible error where

defendant made no objection to departure from statutory procedure. State v. Spencer, 74 Idaho 173, 258 P.2d 1147 (1953).

The trial court, in the sound exercise of its discretion, can elect to give preliminary instructions to the jury. State v. Crook, 98 Idaho 383, 565 P.2d 576 (1977).

Rights of Prosecution.

In trial of criminal causes, district attorney is entitled to have the direction and control of all those matters which properly pertain to the position of the leading attorney in the cause, among which are arranging and putting in the testimony, and arranging order of the argument — subject, of course, at all times to the statutory provisions and reasonable rules and regulations of court, and the directions and control of the judge thereof. State v. Williams, 4 Idaho 502, 42 P. 511 (1895).

19-2103. Argument to jury. — If the indictment is for an offense punishable with death, two (2) counsel on each side may argue the cause to the jury. If it is for any other offense, the court may, in its discretion, restrict the argument to one (1) counsel on each side. [Cr. Prac. 1864, § 356; R.S., R.C., & C.L., § 7857; C.S., § 8943; I.C.A., § 19-2003.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Necessity of Objection.

Failure to follow order of beginning and closing the argument prescribed in this section, can not be urged as error on appeal in absence of an objection made in trial court. *People v. Ah Hop*, 1 Idaho 698 (1878).

19-2104. Presumption of innocence — Reasonable doubt. — A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. [I.C. § 19-2104, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 357; R.S., R.C., & C.L., § 7858; C.S., § 8944; I.C.A., § 19-2004, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cited in: *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

ANALYSIS

Burden of proof.

Instructions to jury.

Burden of Proof.

One imposing defense of alibi must prove the alleged fact of the alibi, not beyond a reasonable doubt nor by a preponderance of the evidence, but to such a degree of certainty as will, when all evidence is considered, create and leave in the minds of the jury a reasonable doubt of the guilt of the accused. *State v. Sheehan*, 33 Idaho 553, 196 P. 532 (1921).

The defense of an alibi raises a question of fact and the jury's verdict thereon will not be disturbed on appeal where there is substantial evidence to support the verdict. *State v.*

Sheehan, 33 Idaho 553, 196 P. 532 (1921).

Statute entitles defendant to presumption of innocence and the burden is always on the state to prove him guilty beyond a reasonable doubt. § 19-2112 (repealed) does not relieve State of that burden, even in cases where it is applicable, but merely goes to the quantum of proof. *State v. Copenbarger*, 52 Idaho 441, 16 P.2d 383 (1932).

The operation of a statute creating a presumption of malice from proof of the commission of a homicide does not relieve the state of the burden of proving defendant's guilt beyond a reasonable doubt, but merely affects the quantum of proof. *State v. Copenbarger*, 52 Idaho 441, 16 P.2d 383 (1932).

Instructions to Jury.

This section does not authorize an instruction to acquit "if the jury are in doubt upon any material fact sought to be proved by the prosecution." *People v. Stapleton*, 2 Idaho (Hasb.) 47, 3 P. 6 (1884).

Substitution of word "unless" for "until" in instructing jury under this section held not prejudicial error. *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922). See also *State v. Bubis*, 39 Idaho 376, 227 P. 384 (1923).

Instruction which places on defendant burden of establishing his innocence is not cured by instruction which states rule correctly. *State v. Stewart*, 46 Idaho 646, 270 P. 140 (1928).

19-2105. Doubt as to degree of crime. — When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only. [I.C., § 19-2105, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 358; R.S., R.C., & C.L., § 7859; C.S., § 8945; I.C.A., § 19-2005 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cited in: *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994).

ANALYSIS

Burglary.

Evidence.

Instructions.

Burglary.

An information for burglary which did not charge whether offense was committed in the daytime or in the nighttime charged the offense of second degree burglary, and a special demurrer based on the ground that the charge did not state whether offense was committed in the daytime or in the nighttime should not have been sustained. *State v. Eubanks*, 77 Idaho 439, 294 P.2d 273 (1956).

Where the evidence establishes that the defendant is guilty of burglary, but fails to establish the time of day of the entry, a verdict of guilty of first degree burglary must be given effect as a verdict of guilty of burglary of the second degree. *State v. Haggard*, 89 Idaho 217, 404 P.2d 580 (1965).

19-2106. Trial of joint defendants. — When two (2) or more defendants are jointly indicted or informed against for a felony or for any criminal offense, the defendants may be tried separately or jointly, in the discretion of the court. [I.C., § 19-2106, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 359; R.S. & R.C., § 7860; am. 1911, ch. 112, p. 368; reen. C.L., § 7860; C.S., § 8946; I.C.A., § 19-2006, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cited in: *State v. Knudtson*, 11 Idaho 524, 83 P. 226 (1905); *State v. Smith*, 30 Idaho 337, 164 P. 519 (1917).

ANALYSIS

Discretion of court.

Evidence.

The commitment of defendant for trial on a higher degree of offense than that the evidence showed him to have committed was not invalid, as the jury on trial of the cause could find him guilty of a lesser included offense. *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967).

Instructions.

Failure to instruct jury that if they found that defendant had committed a public offense but were in doubt as to the degree of the offense he could be convicted only of the lowest degree included in the charge stated in the information and refusal to give requested instruction in the language of this section was reversible error. *State v. Hunter*, 55 Idaho 161, 39 P.2d 301 (1934).

An instruction that, where there is doubt as to which of two or more degrees of a crime a defendant is guilty, he can be convicted only of the highest degree as to his guilt of which the jury has no reasonable doubt was technically correct. *State v. Koho*, 91 Idaho 450, 423 P.2d 1004 (1967).

An instruction that, in case of doubt as to which of two degrees of an offense the defendant is guilty, he can be convicted only of the highest degree of which the jury has, from the evidence, no reasonable doubt as to his guilt is technically correct and not erroneous, but, where only two degrees of the offense charged are involved, it would have been preferable to give the instruction in the language of the former section. *State v. Darrah*, 92 Idaho 25, 435 P.2d 914 (1968).

Joint trial with separate informations.
Motion for separate trial.

Discretion of Court.

Under this statute it was not an abuse of the discretion of the trial court to refuse to grant separate trials to defendants, where each of the defendants desired to be a witness for the other and also a witness in his own trial on his own behalf. *State v. Allen*, 23 Idaho 772, 131 P. 1112 (1913).

Joint Trial with Separate Informations.

In absence of objection in trial court, joint trial based on two separate informations against defendants was not reversible error, albeit irregular. *State v. Huskinson*, 71 Idaho 82, 226 P.2d 779 (1951).

Motion for Separate Trial.

There was no prejudice to a defendant in

denying his motion for a separate trial because of the admission in evidence of a pistol as evidence against a co-defendant but excluded as to defendant where the evidence

showed that both defendants acted in concert during the entire course of the robbery for which they were being tried. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

19-2107. Discharge of codefendant for use as witness. — When two (2) or more persons are included in the same indictment, the court may, at any time before the defendants have gone into their defense, on the application of the prosecuting attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the people. [I.C., § 19-2107, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 370; R.S., R.C., & C.L., § 7861; C.S., § 8947; I.C.A., § 19-2007, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Sec. to sec. ref. This section is referred to in § 19-2109.

Codefendants as Witnesses.

One who has been jointly indicted with defendant on trial, and has entered plea of guilty, is competent witness for state on trial of his codefendant. *State v. Knudtson*, 11 Idaho 524, 83 P. 226 (1905).

Collateral References. Right to severance where two or more persons are jointly accused. 131 A.L.R. 917.

19-2108. Discharge of defendant to testify for codefendants. — When two (2) or more persons are included in the same indictment, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged from the indictment before the evidence is closed, that he may be a witness for his codefendants. [I.C., § 19-2108, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 361; R.S., R.C., & C.L., § 7862; C.S., § 8948; I.C.A., § 19-2008, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as

the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cited in: *State v. Knudtson*, 11 Idaho 524, 83 P. 226 (1905).

19-2109. Discharge equivalent to acquittal. — The order mentioned in the last two (2) sections is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense. [I.C., § 19-2109, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 362; R.S., R.C., & C.L., § 7863; C.S., § 8949; I.C.A., § 19-2009, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8,

effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336, is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

19-2110. Rules of evidence. — The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code. [R.S., R.C., & C.L., § 7864; C.S., § 8950; I.C.A., § 19-2010.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Rules of evidence in civil actions, §§ 9-101 — 9-507.

Cited in: *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 P. 39 (1888); *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953); *State v. Wilson*, 93 Idaho 194, 457 P.2d 433 (1969); *State v. Griffith*, 94 Idaho 76, 481 P.2d 34 (1971); *State v. Stroisch*, 100 Idaho 617, 603 P.2d 572 (1979).

ANALYSIS

Exclusion of witnesses.

Exhibits.

Immaterial evidence.

Impeachment of defendant.

In general.

Necessity for objection to evidence.

Privileged communications.

Proof of official capacity.

Waiver of motion to acquit.

Witnesses.

Exclusion of Witnesses.

Permitting a witness to testify after earlier being present in the court room was not an abuse of discretion or reversible error, in the absence of a showing how the adverse parties were prejudiced by the fact that the witness had been in the court room previous to his testimony. *State v. Oldham*, 92 Idaho 124, 438 P.2d 275 (1968).

The exclusion of witnesses from the court room during trial rests in the sound discretion of the trial court and, where an examination of the record revealed that defendant had originally requested that the state's witnesses be excluded, it was not error for the trial court to make the order applicable to both sides. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), cert. denied, 401 U.S. 942, 91 S. Ct. 947, 28 L. Ed. 2d 223 (1971).

Exhibits.

Offer of a photograph in evidence, to which objection was made and overruled, constitutes an admission thereof in evidence. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Immaterial Evidence.

It is not reversible error to permit one side to introduce immaterial evidence to meet immaterial evidence offered by the other. *State*

v. Breyer, 40 Idaho 324, 232 P. 560 (1925).

Impeachment of Defendant.

The impeachment of a defendant who testified in his own behalf by testimony purporting to show that defendant's reputation for truth, honesty, and integrity in community in which he resided was bad was improper, without defendant first putting his reputation therefor in issue. *State v. Branch*, 66 Idaho 528, 164 P.2d 182 (1945), overruled on other grounds, *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953).

When an accused in a criminal action voluntarily takes the witness stand, he subjects himself to cross-examination and impeachment under the same rules and conditions as any other witness. *State v. Storms*, 84 Idaho 372, 372 P.2d 748 (1962).

The rule that a witness may be impeached by showing that he has previously been convicted of a felony is applicable to criminal cases and a defendant in a criminal case who takes the witness stand in his own behalf may be cross-examined on such matter. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

The statute does not require disclosure of either the number or the nature of the felony or felonies of which an accused has been previously convicted to be used for an impeachment purpose when he has taken the stand in his own defense and, therefore, where defendant charged with committing a lewd and lascivious act with a minor child under the age of 16, in violation of § 18-1508 was asked the question on cross-examination, "Have you ever been previously convicted of a felony?" and the defendant answered in affirmative, he was deprived of a fair trial when the prosecution was allowed to continue further interrogation concerning number or nature of such previous felonies. *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

In General.

Any pertinent fact which throws light upon guilt or innocence of defendant is admissible and is not to be excluded merely because it also tends to prove defendant guilty of another offense. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

The legislature intended that a witness might be impeached in a criminal action as in a civil action; the defendant in a criminal action, as a party to the action, need not testify at all and if he deems it prudent to remain silent, no presumption is to be indulged against him; however, when he voluntarily assumes the character of a witness he

exposes himself to the legitimate attacks which may be made upon any witness. *State v. Storms*, 84 Idaho 372, 372 P.2d 748 (1962).

Necessity for Objection to Evidence.

Inadmissibility of evidence cannot be raised by a motion to strike the answer when there was no objection to the question, where there was no element of surprise to the answer. *State v. Breyer*, 40 Idaho 324, 232 P. 560 (1925).

Asking a state's witness whether he remembered the defendant being under arrest was not prejudicial where an objection to the answer was sustained and other evidence, not objected to showed the arrest. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

The overruling of an objection to evidence operates as an admission thereof. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

Privileged Communications.

Communications between defendant and his personal physician are not privileged in a criminal action since § 9-203 limits the privilege of such communications to civil actions. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Proof of Official Capacity.

In a prosecution against a police officer for

asking and receiving a bribe, parol evidence that defendant was a police officer was proper. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

Waiver of Motion to Acquit.

Defendant who, after motion for peremptory instruction to acquit is overruled, introduces defensive testimony, waives his right to assign error on the action of court in overruling the motion same as in civil cases. *Territory v. Neilson*, 2 Idaho (Hasb.) 614, 23 P. 537 (1890).

Witnesses.

Statutory right to ask a witness for the purpose of impeachment, if he has been convicted of a felony is not limited to civil cases, but also applies to criminal cases, since it is provided by statute that all rules of evidence applicable to civil cases are also applicable to criminal action, and it is further provided by statute that rules for determining competency of witnesses in civil cases are also applicable to criminal action, makes it clear that legislature intended that a witness in a criminal action, might be impeached by showing that he had committed a felony. *State v. Kleier*, 69 Idaho 491, 210 P.2d 388 (1949).

19-2111. Conspiracy — Sufficiency of evidence. — Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one (1) or more overt acts are expressly alleged in the indictment, nor unless one (1) of the acts alleged is proved; but other overt acts not alleged in the indictment may be given in evidence. [I.C., § 19-2111, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7865; C.S., § 8951; I.C.A., § 19-2011 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336 is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cross ref. Conspiracy defined, § 18-1701.

Evidence of Other Crimes.

Evidence of common purpose to commit like crimes and commission of such offenses by defendant are admissible as incidents in commission of common criminal design included in the conspiracy. *State v. Hammock*, 18 Idaho 424, 110 P. 169 (1910).

19-2112. Murder — Burden of proof in mitigation. [Repealed.]

Compiler's notes. This section which comprised I.C., § 19-2112 as added by S.L. 1972, ch. 336, § 8 was repealed by S.L. 1977, ch. 154, § 6.

A former § 19-2112 which comprised Cr.

Prac. 1864, § 363; R.S., R.C., & C.L., § 7866; C.S., § 8952; I.C.A., § 19-2012 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972.

19-2113. Bigamy — Proof of marriage. — Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge. [I.C., § 19-2113, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former § 19-2113, which comprised R.S., R.C., & C.L., § 7867; C.S., § 8953; I.C.A., § 19-2013, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Cross ref. Bigamy, § 18-1101 et seq.

Cited in: State v. Martinez, 43 Idaho 180, 250 P. 239 (1926).

Presumptions.

The validity of a ceremonial marriage will be presumed in the absence of evidence that it was not regular, and laws of a foreign state not being shown will be presumed the same as the laws of this state. State v. Martinez, 43 Idaho 180, 250 P. 239 (1926).

19-2114. Forging bank bills — Proof of incorporation — Expert witnesses. — Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing or attempting to pass, or having in his possession, with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by a general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited. [I.C., § 19-2114, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, §§ 85, 86; R.S., R.C., & C.L., § 7868; C.S., § 8954; I.C.A., § 19-2014, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch.

336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336 is compiled as §§ 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cross ref. Forgery, § 18-3601 et seq.

19-2115. Abortion and abduction — Corroborating testimony. — Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried female of previous chaste character, under the age of eighteen (18) years, for the purpose of prostitution, or aiding or assisting therein, the defendant can not be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence. [R.S., R.C., & C.L., § 7869; C.S., § 8955; I.C.A., § 19-2015.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Abortions, § 18-605 et seq.

Inducing person under 18 into prostitution, § 18-5609.

Cited in: Hull v. Cartin, 61 Idaho 578, 105 P.2d 196 (1940).

ANALYSIS

Corroboration.
Evidence.

Instructions.
Seduction.

Corroboration.

In abortion proceeding testimony of victim can be corroborated by testimony of accomplice and testimony of accomplice can be corroborated by testimony of victim, since the victim is not an accomplice. *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

The corroboration requirement of this section applies only to the offenses enumerated therein and does not by analogy extend to prosecutions under § 18-5602 for procurement of a female over the age of 18. *State v. Rassmussen*, 92 Idaho 731, 449 P.2d 837 (1969).

Evidence.

Conviction for commission of an abortion was justified where testimony of victim and

accomplice was supported by testimony of officers and doctors and circumstantial evidence. *State v. Proud*, 74 Idaho 429, 262 P.2d 1016 (1953).

Instructions.

Instruction in abortion proceeding which stated that testimony of victim and accomplice must be corroborated by "another witness" though not technically correct since statutory term is "other evidence" was substantially correct and could not result in any harm or misunderstanding by the jury. *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

Seduction.

In seduction plaintiff need only prove her case by preponderance of evidence, statute requiring corroboration of prosecutrix in criminal cases being inapplicable. *Kralick v. Shuttleworth*, 49 Idaho 424, 289 P. 74 (1930).

19-2116. False pretense — Sufficiency of evidence. — Upon a trial for having with intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person, any money, personal property, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the hand writing of the defendant, or unless the pretense be proven by the testimony of two (2) witnesses, or that of one (1) witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property. [I.C., § 19-2116, as added by 1972, ch. 336, § 8, p. 844.]

Compiler's notes. A former section, which comprised R.S., R.C., & C.L., § 7870; C.S., § 8956; I.C.A., § 19-2016, was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 8, effective April 1, 1972, in the same words as the section prior to its repeal.

Section 7 of S.L. 1972, ch. 336 is compiled as § 19-1717 — 19-1719 and § 9 is compiled as § 19-2601.

Cross ref. False pretenses, § 18-3101 et seq.

Cited in: *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

ANALYSIS

Corroboration.

Elements to be proven.

Evidence.

Instruction.

Presentence investigation.

Corroboration.

The corroboration requirement of this section is directed toward the pretense itself. *State v. Krepp*, 107 Idaho 314, 688 P.2d 1219 (Ct. App. 1984).

Elements to Be Proven.

Only one false representation is required to be proven though several false representations are alleged if the other elements of the crime are proven. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Evidence.

Admission in evidence of circular describing defendant and his flight from state is erroneous as incompetent to prove any element of crime and calculated to inflame mind of jury. *State v. Whitney*, 43 Idaho 745, 254 P. 525 (1927).

Admission of criminal complaint as evidence is erroneous, whether admitted for purpose of bolstering evidence of prosecuting witness or for purposes of corroboration. *State*

v. Whitney, 43 Idaho 745, 254 P. 525 (1927).

Evidence of conversation had with defendant after his arrest is admissible. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

In prosecutions for obtaining money under false pretenses, circumstances connected with transaction, as well as entire conduct of defendant, including his declarations to third parties, are proper matters for consideration. They furnish necessary corroborative evidence required by this section. *State v. Stevens*, 48 Idaho 335, 282 P. 93 (1929).

Evidence tending to show other similar offenses occurring after the offense charged is admissible as showing a system to cheat or defraud. *State v. Stratford*, 55 Idaho 65, 37 P.2d 681 (1934).

Evidence held sufficient to sustain conviction. *State v. Dunn*, 60 Idaho 568, 94 P.2d 779 (1939).

Evidence was sufficient to justify verdict of guilty where the evidence, though conflicting, could be reasonably construed as disclosing that the defendant made false representations with the intent and expectation that the victims would act upon them to their injury, and they did so act. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Victims were defrauded where they parted with \$745.80 for purchase of shingles and the only shingles delivered were of an inferior grade and no part of their money was returned. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

19-2117. Testimony of accomplice — Corroboration. — A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof. [Cr. Prac. 1864, § 364; R.S., R.C., & C.L., § 7871; C.S., § 8957; I.C.A., § 19-2017.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Petereit*, 39 Idaho 715, 229 P. 747 (1924); *Hull v. Cartin*, 61 Idaho 578, 105 P.2d 196 (1940); *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953); *State v. Boetger*, 96 Idaho 535, 531 P.2d 1180 (1975); *State v. Perez*, 99 Idaho 181, 579 P.2d 127 (1978); *State v. Kiss*, 108 Idaho 418, 700 P.2d 40 (1985); *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985); *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994), cert. denied, 513 U.S. 901, 115 S. Ct. 260, 130 L.

In prosecution of defendant for obtaining money under false pretenses, evidence of similar transactions with persons other than the person upon which the indictment was based was admissible. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Where the state did not claim that defendant had impersonated anyone else, nor did it allege the existence of any false token or writing, the state was required to prove the pretense — i.e., defendant's alleged oral statements — by corroborating circumstances in addition to the victim's testimony. *State v. Krepp*, 107 Idaho 314, 688 P.2d 1219 (Ct. App. 1984).

Instruction.

An instruction was correct which stated that it was not a necessary element of the crime of false pretense that the person against whom the offense is directed be permanently deprived of his money or property. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Presentence Investigation.

Refusal of trial court to conduct a presentence investigation of defendant convicted of obtaining money under false pretenses was not erroneous where the defendant made no request for withholding or suspension of the sentence. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Ed. 2d 180 (1994); *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994).

ANALYSIS

Application to particular cases.
Argument of counsel.
Competency of accomplice.
Cross-examination of accomplice.
Determination of who is accomplice.
Foundation testimony.
Instructions.
Purpose.
Question for jury.
Review of corroboration.
Sufficiency of corroboration.
— Statements of defendant.
Who is accomplice.

Application to Particular Cases.

On a charge of incest, prosecutrix, if over age, is an accomplice, and conviction can not be had on her uncorroborated testimony. *State v. Clark*, 27 Idaho 48, 146 P. 1107 (1915).

In prosecution for adultery, accused cannot be convicted upon uncorroborated testimony of prosecuting witness. *State v. Sims*, 35 Idaho 505, 206 P. 1045 (1922); *State v. Shelton*, 46 Idaho 423, 267 P. 950 (1928).

Corroboration of the testimony of an accomplice is necessary in a case involving the commission of the infamous crime against nature to support conviction. *State v. Larsen*, 81 Idaho 90, 337 P.2d 1, cert. denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

An accomplice's testimony linking defendant to a fire which destroyed his own house was sufficiently corroborated by evidence that defendant moved almost all of his uninsured equipment out of the house just before the fire, that defendant called the fire department from neighbor's house instead of his own, that defendant made an appointment prior to the fire to get a new artificial leg, that defendant left his wallet and checkbook in pickup taken by his accomplice, that defendant listed an inflated value for his house on his proof of loss form, that defendant had access to the two points of origin of the fire which expert testified were started by accelerants, that he had opportunity to set the fire in those areas and that defendant would gain substantially if his inflated proof of loss was paid. *State v. Morris*, 116 Idaho 16, 773 P.2d 284 (Ct. App. 1989).

Defendant's conviction was reversed where there was no physical evidence nor testimony from any person other than a co-conspirator that indicated defendant was involved in the burglaries or the associated conspiracy. *State v. Dietrich*, 135 Idaho 870, 26 P.3d 53 (Ct. App. 2001).

Argument of Counsel.

The burden of establishing error in refusing appellant's counsel the right to explain in his argument to the jury the law applicable to the testimony of accomplices, was upon appellant. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

Competency of Accomplice.

An accomplice may testify to any fact the same as any other witness, the law merely requires corroboration as a basis for conviction. *State v. Brown*, 53 Idaho 576, 26 P.2d 131 (1933).

In abortion proceeding testimony of victim can be corroborated by testimony of accomplice and testimony of accomplice can be corroborated by testimony of victim, since the victim is not an accomplice. *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

Where accomplice testified that gas can

found in arson fire was the same kind used by defendant, defendant admitted threatening to set the fire and husband said "I told you they would catch you," it was enough to corroborate testimony of the accomplice. *State v. Swenor*, 96 Idaho 327, 528 P.2d 671 (1974), overruled on other grounds, *State v. Walters*, 120 Idaho 46, 813 P.2d 857 (1990).

Cross-examination of Accomplice.

Where it was not obvious from a mere reading of the questions that counsel intended to prove witness had received clemency and was therefore corrupt, no offer of proof being made at the time the objections were sustained which would in any manner call the court's attention to such theory of the questions, the court sustaining objections on the theory that the questions were improper for impeachment purposes, such other theory is not available to appellants as error in absence of offer of proof showing it should have been received. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Determination of Who Is Accomplice.

When the question as to whether witness is an accomplice arises, it is the duty of the trial court to instruct the jury on the law of accomplices, and leave the question as to whether or not any witness is an accomplice in the commission of the offense charged for the decision of the jury as a matter of fact, unless it appear without substantial conflict in the testimony that such witness was an accomplice. *State v. Grant*, 26 Idaho 189, 140 P. 959 (1914).

Where it is uncertain whether or not a witness is an accomplice, the question as a general rule should be submitted to the jury under proper instructions, and defendant's requested instruction that witness was an accomplice as a matter of law, was properly refused. *State v. Brown*, 53 Idaho 576, 26 P.2d 131 (1933).

Where a witness had an altercation with the decedent shortly before the alleged murder, accompanied the defendant to his home to obtain a rifle, rode back to the scene of the shooting with defendant, and sat in the car with him as he shot the decedent, and then rode away with the defendant, there was presented an issue as to whether or not such witness was an accomplice and the jury should have been instructed on the law relating to and defining accomplices and that if they found such witness to be an accomplice, his testimony must be corroborated by other evidence to sustain a conviction based thereon. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

Where state's witness made unequivocal statements that he assisted in looting of station wagon and wilfully participated in hiding the stolen goods, although he did not take the typewriter or cover concerning which defen-

dant was charged, the witness was an accomplice. *State v. Emmons*, 94 Idaho 605, 495 P.2d 11 (1972).

In a grand larceny prosecution, district court erred in allowing the jury to pass on accomplice issue where it appeared without substantial conflict in the testimony that the state witness was an accomplice. *State v. Emmons*, 94 Idaho 605, 495 P.2d 11 (1972).

Minors who purchased beer from defendant were held not to be accomplices of defendant, who was charged with selling beer to the minors, on the basis that separate crimes of selling beer to a minor and purchasing beer by a minor were committed. *State v. Murphy*, 94 Idaho 849, 499 P.2d 548 (1972).

It is a question for the jury to decide whether a state witness was an accomplice of the defendant in the commission of a burglary so as to require the corroboration of the testimony of such witness to support a conviction. *State v. Sensenig*, 95 Idaho 218, 506 P.2d 115 (1973).

The defendant, having denied that he was involved in the robberies, raised a direct conflict in the evidence on the issue of whether or not adverse witness was an accomplice, and the trial court properly submitted that issue to the jury. *State v. Lucio*, 99 Idaho 765, 589 P.2d 100 (1979).

Where participant in murder had earlier testified during trial that witness went into victim's house and held victim's legs down to the bed when the boys were killing him, but witness refuted this, claiming he never went into the house and that his only involvement was that of a bystander who received a share of the stolen money in return for a promise not to ever talk about the incident, and he also claimed that he never encouraged the others in the commission of the crime, the trial court did not err in refusing to instruct that witness was an accomplice as a matter of law. The question whether he was an accomplice was for the jury to decide upon conflicting evidence and the fact of witness' admission of charge of voluntary manslaughter in juvenile court did not make him an accomplice per se, in light of his denial of participation or encouragement in the crime. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

If there are facts in dispute or in conflict which raise a genuine issue as to whether a witness is indeed an accomplice, the court must submit that issue to the jury for resolution. *State v. Ruiz*, 115 Idaho 12, 764 P.2d 89 (Ct. App. 1988).

In a prosecution for wasting a game animal in violation of § 36-1202, a witness's mere presence during the events for which the defendant was convicted, and his singular act of moving a more culpable hunting companion's vehicle at the latter's insistence, fell far

short of establishing that the witness was an accomplice as a matter of law, and the jury rationally found that his role was more akin to that of an acquiescing bystander; thus, conviction could be had on the witness's uncorroborated testimony. *State v. Ruiz*, 115 Idaho 12, 764 P.2d 89 (Ct. App. 1988).

Foundation Testimony.

This section does not prohibit an accomplice from providing the necessary foundation testimony for the admission of an item of physical evidence. *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978).

Instructions.

Instruction in abortion proceeding which stated that testimony of victim and accomplice must be corroborated by "another witness" though not technically correct since statutory term is "other evidence" was substantially correct and could not result in any harm or misunderstanding by the jury. *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954).

If it appears as a matter of law that a witness is an accomplice of the defendant, the court should so instruct the jury and should also instruct them concerning the necessary corroboration of his testimony. *State v. Wilson*, 93 Idaho 194, 457 P.2d 433 (1969).

The trial judge, in refusing to give a requested instruction, observed that the instruction would only serve to confuse the jury, would constitute a comment on the evidence by the court and would be in conflict with the instruction on credibility of the witnesses, in similar circumstances, the court should never instruct the jury that an accomplice's testimony should be viewed with distrust. *State v. Lucio*, 99 Idaho 765, 589 P.2d 100 (1979).

The district court's failure to give the accomplice instruction, even if it were erroneous, was harmless, where the defendant's own testimony was sufficient to permit a finding that the defendant was connected with the commission of the offense, even though the defendant's testimony did not corroborate the accomplice's version of the facts. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied., 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

The district court must instruct the jury regarding the necessity of evidence to corroborate an accomplice's testimony, whether the evidence raises a genuine issue as to whether a witness is an accomplice, in which case the court must submit the issue to the jury for resolution, or whether it is clear that the witness is an accomplice of the defendant, in which case the court should decide the question as a matter of law and inform the jury that the witness is an accomplice. *State v. Mack*, 132 Idaho 480, 974 P.2d 1109 (Ct. App. 1999).

Defendant failed to show that he received

ineffective assistance of counsel where trial counsel did not request a jury instruction regarding the corroboration of accomplice testimony because, based on the evidence presented, there was no indication that the outcome of the trial would have been different with the requested instruction. *Matthews v. State*, 136 Idaho 46, 28 P.3d 387 (Ct. App. 2001).

Purpose.

The purpose of the corroboration requirement is to offset the danger that an accomplice may wholly fabricate testimony inculcating an innocent person in order to win more lenient treatment for the alleged accomplice. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

The purpose of the corroboration rule is served when the corroborative evidence independently tends to link the defendant with commission of the crime. *State v. Morris*, 116 Idaho 16, 773 P.2d 284 (Ct. App. 1989).

The statutory corroboration requirement is intended to protect against the danger that an accomplice may wholly fabricate testimony, incriminating an innocent defendant in order to win more favorable treatment for the accomplice. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Question for Jury.

Some aiding, abetting or actual encouragement on the person's part is essential to make that person an accomplice and mere acquiescence in, or silent consent to the commission of an offense on the part of a bystander, however reprehensible the crime may be, is not sufficient to make one an accomplice. Where there are facts in dispute or in conflict which raise a genuine issue as to whether a witness is indeed an accomplice, the court must submit that issue to the jury for resolution. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

Review of Corroboration.

The sufficiency of corroborating evidence will not be reviewed where the particulars wherein it is not sufficient are not set out in the assignment. *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945).

Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact or it may be entirely circumstantial. *State v. McCandless*, 70 Idaho 468, 222 P.2d 156 (1950); *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

Sufficiency of Corroboration.

Corroborating evidence must be upon some material fact or circumstance which, standing

alone and independent of the evidence of accomplice, tends to connect defendant with the commission of the offense. *State v. Knudtson*, 11 Idaho 524, 83 P. 226 (1905); *State v. Bond*, 12 Idaho 424, 86 P. 43 (1906).

It is not necessary that accomplice be corroborated in every detail. Law contemplates that some weight should be given testimony of an accomplice. *State v. Smith*, 30 Idaho 337, 164 P. 519 (1917).

Requirement of this section is met by evidence, independent of accomplice's testimony, tending to connect defendant with commission of the offense. *State v. Whisler*, 32 Idaho 520, 185 P. 845 (1919); *State v. Sims*, 35 Idaho 505, 206 P. 1045 (1922).

Any corroborative evidence legitimately tending to connect defendant with crime may be sufficient, although standing by itself it would not warrant conviction of crime charged. *State v. Gillum*, 39 Idaho 457, 228 P. 334 (1924).

No general rule can be stated with respect to quantum of evidence corroborating accomplice's testimony which is necessary to warrant conviction; each case must be governed by its own circumstances, keeping in view nature of crime, character of testimony, and general requirements with respect to corroboration. *State v. Gillum*, 39 Idaho 457, 228 P. 334 (1924).

Where circumstances point to guilt of accused, independent of testimony of accomplice, such circumstantial evidence may be sufficient corroboration to sustain conviction. *State v. Gillum*, 39 Idaho 457, 228 P. 334 (1924); *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

It is not necessary that there shall be corroborating evidence concerning every material fact as to which accomplice testified; nor is it necessary that whole case shall be proved outside testimony of accomplice. *State v. Gillum*, 39 Idaho 457, 228 P. 334 (1924).

Mere disposition and opportunity to commit adultery are not alone sufficient to justify conviction, but there must be circumstances inconsistent with any other reasonable hypothesis. *State v. Shelton*, 46 Idaho 423, 267 P. 950 (1928).

Corroborating testimony need only connect accused with the crime, it may be slight and need only go to one material fact. It may be entirely circumstantial. *State v. Orr*, 53 Idaho 452, 24 P.2d 679 (1933).

Corroboration of accomplice need only connect defendant with the crime, it may be slight and need only go to one material fact. It may be entirely circumstantial. One accomplice may corroborate another, if corroborated. *State v. Brown*, 53 Idaho 576, 26 P.2d 131 (1933).

Statements and actions of the defendant after his arrest testified to by witnesses may

constitute sufficient corroboration of an accomplice's testimony to comply with this section. *State v. Brown*, 53 Idaho 576, 26 P.2d 131 (1933).

It is not necessary that the testimony of an accomplice be corroborated in every detail, any corroboration tending to connect the defendant with the commission of the crime may be sufficient to warrant conviction, although standing by itself it would not be sufficient. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

In criminal trial where circumstances point to guilt of defendant independent of the testimony of defendant's accomplices, such evidence may corroborate accomplices' testimony sufficiently to sustain a conviction since it is not necessary to sustain accomplices' testimony in every detail. *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945).

Under the provisions of this section corroborative evidence need only tend to connect defendant with the crime, it may be slight and it need only go to one material fact. *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945).

The testimony of an accomplice need not be corroborated by direct evidence. The conduct of the defendant may be looked to for corroborating circumstances and if it tends to connect the accused with the crime the corroboration is sufficient. *State v. Mundell*, 66 Idaho 339, 158 P.2d 799 (1945).

Testimony of prosecutrix was not required to be corroborated where testimony was not in conflict with physical evidence and surrounding circumstances and character of prosecutrix was not seriously impeached. *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1950).

Conviction for commission of an abortion was justified where testimony of victim and accomplice was supported by testimony of officers and doctors and circumstantial evidence. *State v. Proud*, 74 Idaho 429, 262 P.2d 1016 (1953).

The jurors in a case involving the prosecution of the infamous crime against nature were correctly instructed in substance that the testimony of an accomplice alone would not support a conviction, but there must be other evidence connecting the defendant with the crime, and this evidence might be furnished by the statements, admissions, or confession of the defendant. *State v. Larsen*, 81 Idaho 90, 337 P.2d 1, cert. denied, 361 U.S. 882, 80 S. Ct. 154, 4 L. Ed. 2d 119 (1959).

Evidence establishing defendants and accomplice were in the truck used to haul away the dead steer after it had been killed, at the approximate time the crime was committed, sufficiently corroborated accomplice's testimony as to the killing, stealing and taking away of the steer. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

It is not necessary that there be corroborating evidence concerning every material fact as to which the the accomplice testified. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

This section permits conviction upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroborating evidence must be independent of the testimony of the accomplice and connecting or tending to connect the defendant with the commission of the crime charged. *State v. Bassett*, 86 Idaho 277, 385 P.2d 246 (1963).

A defendant was not convicted of murder on the uncorroborated testimony of an accomplice where he admitted being the last known person to see the deceased alive, being in the vicinity where she was last seen, and being with the alleged accomplice at the time he claimed they both found the body. *State v. Larsen*, 91 Idaho 42, 415 P.2d 685 (1966).

It would seem that the victim of a rape may corroborate testimony of an accomplice of the defendant and, where necessary, the accomplice may corroborate the victim's testimony. *State v. Wilson*, 93 Idaho 194, 457 P.2d 433 (1969).

Where a defendant made an admission to police officers that she had received money orders for a co-conspirator and a witness testified that the defendant had told her that she had not received money orders from the co-conspirator, the inconsistent statement and the admission were, although slight and circumstantial, enough to connect her with the crime of conspiracy to commit first-degree murder; such statements, which were admissible to corroborate the testimony of an accomplice, were sufficient corroboration to support a conspiracy conviction. *State v. Garcia*, 102 Idaho 378, 630 P.2d 665 (1981).

Where the victim of a robbery had pulled down one robber's ski mask sufficiently to testify that the robber's eyes and nose were similar to the defendant's and a state expert witness testified that several of the seven hairs taken from the discarded ski mask were similar enough to the defendant's hair that the possibility could not be ruled out that they were the defendant's hairs, there was sufficient corroboration of an accomplice's testimony under this section to support defendant's conviction for robbery. *State v. Evans*, 102 Idaho 461, 631 P.2d 1220 (1981).

An accomplice can neither corroborate himself nor another accomplice to sustain a conviction within the requirements of this section. *State v. Brooks*, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982).

Although the corroboration must connect the accused with the crime, it may be slight and need only go to one material fact. *State v.*

Pierce, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Corroborating testimony may be slight and need only go to one material fact; in addition, the testimony may be entirely circumstantial. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

The corroborating evidence offered need only connect the defendant with the crime; while the corroborating evidence must be independent of the accomplice's testimony, it need not be sufficient in and of itself to convict the defendant. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

The corroborating evidence must be independent of the accomplice's testimony, but it need not be sufficient in and of itself to convict the defendant. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

The corroborating evidence may be slight, need only go to one material fact and may be entirely circumstantial. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Corroborating evidence must connect the defendant to the crime, but need not be sufficient, in itself, to convict the defendant, and need not corroborate the testimony of an accomplice in every detail. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

Where the record showed that there were two non-accomplice witnesses who corroborated the accomplice testimony, there was sufficient evidence at trial to satisfy this section. *State v. Pecor*, 132 Idaho 359, 972 P.2d 737 (Ct. App. 1998).

—Statements of Defendant.

Statements made by a defendant may supply the corroboration of an accomplice that is necessary for conviction. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Statements made by the defendant indicating particular knowledge of the probable location of the body prior to its discovery together with the condition of the body as described by the autopsy and the fact that the victim's hands were tied behind his back could lead a jury to believe that the defendant was a participant in both the aggravated battery and the kidnapping, and the jury was free to conclude that the defendant's disclosures corroborated the testimony of the accomplices as to those two charges. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Statements made by the defendant to several people showed his participation in the alleged murder and corroborated the testimony of the accomplices as to that charge. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Who is Accomplice.

In order to make a person an accomplice in commission of a crime, some aiding, abetting, or actual encouragement by such person must be shown. Mere presence at the plotting of crime or silent acquiescence in its commission is not, in the absence of a legal duty to act, sufficient to constitute one an accomplice. Failure to disclose known facts regarding commission of crime does not render one having such knowledge an accomplice of person who committed the crime. *State v. Grant*, 26 Idaho 189, 140 P. 959 (1914); *State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916).

Accomplice is one who, at any state of criminal enterprise, participates in any degree in its commission under such circumstances as warrant conclusion that acts under consideration were knowingly done in aid of unlawful enterprise. *State v. Grimmett*, 33 Idaho 203, 193 P. 380 (1920).

Accessory after fact is not an accomplice. He does not become connected with crime until after its completion. *State v. Grimmett*, 33 Idaho 203, 193 P. 380 (1920).

The briber of a police officer is not an "accomplice" with the officer since he is guilty of a distinct and separate offense. *State v. Emory*, 55 Idaho 649, 46 P.2d 67 (1935).

An "accomplice" is a person concerned in the commission of a crime, whether he directly participates in the acts constituting the crime or aids and abets in its commission, or, not being present, has advised or encouraged its commission. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

Where a witness in a burglary prosecution did not become connected with the crime until after its commission, he was an "accessory after the fact" and not an "accomplice," within the meaning of this section. *State v. Gilbert*, 65 Idaho 210, 142 P.2d 584 (1943).

While individual did make contact with defendant and did buy cocaine from him, her actions in purchasing the cocaine did not automatically make her an accomplice to defendant's crime; there was no evidence that they had a common plan, nor was there a factual dispute compelling the district court to submit the accomplice question to the jury. *State v. Bruno*, 119 Idaho 199, 804 P.2d 928 (Ct. App. 1990).

19-2118. Discharge of jury for want of jurisdiction, or insufficiency of indictment. — The court may direct the jury to be discharged where it appears that it has not jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense punishable by law. [Cr. Prac. 1864, § 367; R.S., R.C., & C.L., § 7872; C.S., § 8958; I.C.A., § 19-2018.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Indictments, § 19-1401 et seq.

19-2119. Discharge of jury for want of jurisdiction — Offense committed out of state. — If the jury is discharged because the court has not jurisdiction of the offense charged in the indictment, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged. [Cr. Prac. 1864, § 368; R.S., R.C., & C.L., § 7873; C.S., § 8959; I.C.A., § 19-2019.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2120. Offense committed in another county. — If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the proper county for his arrest; or if the offense is a misdemeanor only, it may admit him to bail in an undertaking, with sufficient sureties, that he will, within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself upon the warrant, if issued, or that his bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment, and of all the papers filed in the action, to the prosecuting attorney of the proper county, the expense of which transmission is chargeable to that county. [Cr. Prac. 1864, §§ 369, 370; R.S., R.C., & C.L., § 7874; C.S., § 8960; I.C.A., § 19-2020.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2121. Procedure if defendant not arrested — Procedure if defendant arrested. — If the defendant is not arrested on a warrant from the proper county, as provided in the last section, he must be discharged from custody, or his bail in the action exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the

undertaking, as mentioned in that section, must be discharged. If he is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate. [Cr. Prac. 1864, §§ 371, 372; R.S., R.C., & C.L., § 7875; C.S., § 8961; I.C.A., § 19-2021.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Proceedings on arrest of a person triable in another county, §§ 19-517, 19-518.

19-2122. Procedure upon discharge of jury for insufficiency of indictment. — If the jury is discharged because the facts as charged do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged; or if admitted to bail, that his bail be exonerated; or if he has deposited money instead of bail, that the money be refunded to him, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case it may direct that the case be submitted to the same or another grand jury. [Cr. Prac. 1864, § 373; R.S., R.C., & C.L., § 7876; C.S., § 8962; I.C.A., § 19-2022.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Indictments, § 19-1401 et seq.

19-2123. Advisory instruction to acquit. — If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it must advise the jury to acquit the defendant. But the jury are not bound by the advice. [Cr. Prac. 1864, § 375; R.S., R.C., & C.L., § 7877; C.S., § 8963; I.C.A., § 19-2023.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951, which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Horn, 27 Idaho 782, 152 P. 275 (1915); State v. McCarty, 47 Idaho 117, 272 P. 695 (1928); State v. McGonigal, 89 Idaho 177, 403 P.2d 745 (1965); State v. Erwin, 98 Idaho 736, 572 P.2d 170 (1977); State v. Huggins, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982).

ANALYSIS

Appeal.

Discretion of court.

Effect of statute.

Form of instruction.

Form of motion.

Necessity of request.

Other instructions.

Supporting evidence.

When given.

Appeal.

Refusal to give instruction advising jury to acquit is not reviewable in Supreme Court. State v. McClurg, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937).

The giving or refusing of an advisory instruction to acquit is not reviewable on appeal if there is some evidence upon which to base a verdict of guilty. State v. McCallum, 77 Idaho 489, 295 P.2d 259 (1956); State v. Puckett, 88 Idaho 546, 401 P.2d 784 (1965).

Discretion of Court.

Giving of the instruction authorized by this section is matter of discretion with trial court and its action in the premises is not reviewable by Supreme Court. State v. Haverly, 4 Idaho 484, 42 P. 506 (1895); State v. Murphy, 29 Idaho 42, 156 P. 908 (1916); State v. Simpson, 31 Idaho 591, 173 P. 748 (1918);

State v. Sullivan, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921); State v. Hanson, 37 Idaho 734, 219 P. 1062 (1923); State v. Conner, 59 Idaho 695, 89 P.2d 197 (1939).

If there is insufficient evidence to support a verdict of guilty, it is the duty of the court to grant absolute acquittal, under this section; however, where there is evidence upon which to base a verdict of guilty, denial of a motion to advise jury to acquit is not reversible error. State v. Gish, 87 Idaho 341, 393 P.2d 342 (1964).

The issuance of an advisory instruction to acquit under this section is discretionary with the court and the Supreme Court could not review action of the trial court in denying the motion for such an advisory instruction of a defendant against whom the only evidence was his voluntary extra-judicial confession corroborated only by circumstantial evidence. State v. Urie, 92 Idaho 71, 437 P.2d 24 (1968).

The granting or denying of an advisory instruction to acquit is in the first instance within the sound discretion of the trial court and such discretion will not be reversed on appeal unless a clear abuse is shown. State v. Wozniak, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975).

In prosecution for assault with intent to commit murder, where evidence showed that defendant had made a two-handed firing of his pistol through the windshield of a parked van at close range after the victim had indicated he was unarmed, exited the van and approached the victim's prone body to within three feet, then returned to the van and drove away, there was no abuse of discretion in denying an advisory instruction to acquit under this section. State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979).

It is well-settled in Idaho that the granting or denying of an advisory instruction to acquit is within the discretion of the trial court, and such discretion will not be reversed on appeal unless a clear abuse of discretion is shown. State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979).

The rule is well settled in Idaho that the action of the trial court in giving, or refusing to give, an advisory instruction to acquit, is purely a discretionary matter which is not reviewable on appeal if there is some substantial evidence upon which to base a verdict of guilty. State v. Elisondo, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982).

Effect of Statute.

The effect of a statute which bestows a duty on the trial court to advise the jury to acquit the defendant if the court deems the evidence insufficient to warrant a conviction, is to limit the power of the trial court to direct acquittal but not to abolish it. State v. Grow, 93 Idaho 588, 468 P.2d 320 (1970).

Form of Instruction.

Court may advise jury to acquit but can not take facts from the jury by a peremptory instruction to acquit. Territory v. Neilson, 2 Idaho (Hasb.) 614, 23 P. 537 (1890); State v. Peck, 14 Idaho 712, 95 P. 515 (1908); State v. Douglass, 35 Idaho 140, 208 P. 236 (1922).

It is not error for court to refuse to instruct the jury to find defendant not guilty; court may advise the jury to acquit defendant, but the jury is not bound by the advice. State v. Wright, 12 Idaho 212, 85 P. 493 (1906); State v. Murphy, 29 Idaho 42, 156 P. 908 (1916); State v. Sullivan, 34 Idaho 68, 199 P. 647, 17 A.L.R. 902 (1921); State v. Chacon, 36 Idaho 148, 209 P. 889 (1922), overruled on other grounds, State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992); State v. West, 42 Idaho 214, 245 P. 85 (1926); State v. Stevens, 48 Idaho 335, 282 P. 93 (1929).

If court advises jury to acquit, it ought also to advise them that they are not bound by such advice, but may bring in a verdict of conviction regardless of it. State v. Downing, 23 Idaho 540, 130 P. 461 (1913).

If evidence is insufficient court may advise jury to acquit, but this advice is not binding on jury and they should be so instructed. State v. Stevens, 48 Idaho 335, 282 P. 93 (1929).

Form of Motion.

Motion for nonsuit is improper in a criminal case, People v. Barnes, 2 Idaho (Hasb.) 161, 9 P. 532 (1886); but if the prosecution fails to make a case, court should instruct the jury to acquit regardless of a verbal mistake of attorney for defendant in framing his motion. Territory v. Neilson, 2 Idaho (Hasb.) 614, 23 P. 537 (1890).

Necessity of Request.

Where defense did not request an instruction to the jury and the trial court instructed jury as to the general law regarding arrest quoting §§ 19-601 — 19-603, the trial court gave adequate instructions regarding the issues of the case. State v. Wozniak, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975).

Other Instructions.

Trial of a Nez Perce Indian for misdemeanor of illegally possessing game during a closed season for which defendant could not be legally convicted did not require the court to charge the jury on all matters of law pertaining to a criminal trial where the district court advised the jury to acquit the defendant. State v. Powaukee, 78 Idaho 257, 300 P.2d 488 (1956).

Supporting Evidence.

The common issue as to either a motion for advisory instruction to acquit or a motion for judgment of acquittal, is whether there is "substantial" evidence to support a conviction and if there is such evidence in the record, a defendant was not denied the effective assistance of counsel by the failure of his attorney to move for acquittal or to request an advisory instruction to acquit. *State v. Elisondo*, 103 Idaho 69, 644 P.2d 992 (Ct. App. 1982).

When Given.

Where there is no evidence upon which to base a conviction, the judge must direct the jury to acquit. However, where there is evidence, but in the judge's opinion, an insuffi-

cient amount of it upon which to base a conviction, the judge must advise the jury to acquit. The distinction turns on the quantum of evidence produced. *State v. Grow*, 93 Idaho 588, 468 P.2d 320 (1970).

A motion for a directed verdict of acquittal must be granted only where there is a total lack of evidence upon which to base a verdict of guilt; where there is some evidence upon which to base a verdict of guilt, the trial court may only, in its discretion, give an advisory instruction to acquit. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727 (1972).

Collateral References. Dismissing defendant in criminal case for insufficiency of evidence after submission of case to jury, power of trial court as to. 131 A.L.R. 187.

19-2124. View of premises by jury. — When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose; and the sheriff must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time. [Cr. Prac. 1864, §§ 376, 377; R.S., R.C., & C.L., § 7878; C.S., § 8964; I.C.A., § 19-2024.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Welker*, 129 Idaho 805, 932 P.2d 928 (Ct. App. 1997).

ANALYSIS

Automobiles involved in accidents.

Discretion of court.

Extraneous evidence.

Limitations of view.

Presence of defendant at view.

Time of view.

View not evidence.

Waiver.

Automobiles Involved in Accidents.

Although this statute in prosecution for negligent homicide, does not authorize the court to permit the jury to examine automobiles involved in accident, even in the absence of statute, it was not improper to order such view as evidence and the allowance of such a view is a matter within the inherent power of the trial court to be exercised only within its sound discretion. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Discretion of Court.

Court did not err in denying motion of defendant that the jury be conducted to the scene of an attempted burglary, where record showed that physical condition of the scene of the crime had changed since the date of the crime. *State v. Kleier*, 69 Idaho 491, 210 P.2d 388 (1949).

Where ample testimony indicated that the physical condition of the scene of the crime had been changed in the interim between the criminal act and the jury trial, and no valid observation of that scene so changed could have assisted the jury in its determinations, the discretionary authority of the trial court was not exercised erroneously in denying defendant's motion for a jury view. *State v. Myers*, 94 Idaho 570, 494 P.2d 574 (1972).

Extraneous Evidence.

Where evidence has been improperly received by jury engaged in a view under this section presumption arises, in case of one being prosecuted for commission of an offense, that the jury has been prejudicially influenced by receiving evidence other than a view of the premises. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

Limitations of View.

Jury is confined to view of place where material facts occurred. *State v. Main*, 37

Idaho 449, 216 P. 731 (1923).

Animate objects should not be viewed except in the regular way. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

It is error to allow jury to view object that can be introduced in evidence. *State v. Main*, 37 Idaho 449, 216 P. 731 (1923).

Presence of Defendant at View.

Where defendant requests a view of premises where crime was committed, fact that defendant does not accompany the jury upon such view is not ground for a new trial in absence of any request that defendant should be permitted to accompany them, *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894); but doubts are expressed as to the correctness of this ruling in *State v. McGinnis*, 12 Idaho 336, 85 P. 1089 (1906); and it is error to deny defendant the right to be present at the view if he requests such right either in person or by counsel. *State v. McGinnis*, 12 Idaho 336, 85 P. 1089 (1906).

It is now settled that whatever rights defendant may have under this section they may be waived by his failure to make timely objection. *State v. Moon*, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911); *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

Time of View.

No precise time is fixed by the statute when the view shall be had. *State v. Moon*, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911).

This section contemplates a view prior to the argument of counsel and the giving of instructions by court. It was not intended by this section to give the jury permission to view premises after the cause had been submitted to them. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

View Not Evidence.

Instruction to jury that what it observes at

view does not become evidence, and is not to be taken into consideration in arriving at verdict except as a means to better understand and apply testimony adduced at trial, is not erroneous. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Waiver.

Objection to a view of the premises must be made at time such view is requested, else it will be waived. *State v. Moon*, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911).

Timely objection must be made if advantage is to be taken of the absence of trial judge at the view. *State v. Moon*, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911).

While it is improper to allow the jury to view the premises after the charge to the jury, yet when defendant expressly consents to such view, and with his counsel accompanies the jury on such view, he thereby waives such irregularity, and in effect joins in the request. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

Where record fails to show that defendant requested attendance of trial judge at view, or that he be allowed to attend view, or that he made prompt objection to failure of judge to attend or allow his attendance, he must be deemed to have waived such objection, unless he can show that something improper tending to prejudice him took place at the view. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

Collateral References. Demonstration, test, or experiment during authorized view. 150 A.L.R. 958.

19-2125. Disclosure of facts known by juror. — If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact which could be evidence in the cause, as of his own knowledge, the jury may return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties. [Cr. Prac. 1864, § 378; R.S., R.C., & C.L., § 7879; C.S., § 8965; I.C.A., § 19-2025.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2126. Custody of jury during trial. — The jury sworn to try any felony may, at any time during the trial, and after the submission of the cause, in the discretion of the court, be permitted to separate, or they may be kept together, in the charge of a proper officer. Provided however, that in causes where the defendant has been charged with first-degree murder, the jury may not be permitted to separate after submission of the cause and completion of the special sentencing proceeding held pursuant to section 19-2515 or 19-2515A, Idaho Code. Before permitting the jury to separate after the cause has been submitted, the court shall permit counsel to place objections, if any, on the record outside the presence of the jury. In case the court orders the jury to be kept together the county must provide a suitable place for the board and lodging of the jury, at the expense of the county, and when first given custody of the jury the officer or bailiff must be sworn to keep the jury together during each recess and adjournment during the trial; to allow no person to speak to or communicate with them, or any of them, nor to do so himself, on any subject connected with the trial, and to return them into court as ordered by the court. [Cr. Prac. 1864, § 379; am. 1881, p. 227, § 4; R.S., R.C., & C.L., § 7880; C.S., § 8966; am. 1929, ch. 14, § 1, p. 14; I.C.A., § 19-2026; am. 1981, ch. 229, § 1, p. 465; am. 1987, ch. 145, § 1, p. 289; am. 2002, ch. 94, § 11, p. 256; am. 2003, ch. 19, § 3, p. 71; am. 2003, ch. 136, § 2, p. 394.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

This section was amended by two 2003 acts — ch. 19, § 3, effective February 13, 2003, and ch. 136, § 2, effective March 27, 2003 — which do not conflict and have been compiled together.

The 2003 amendment by ch. 19, § 3, added “and completion of the special sentencing proceeding held pursuant to section 12-2515, Idaho Code” in the second sentence, and made a technical correction.

The 2003 amendment by ch. 136, § 2, added “or 19-2515A” at the end of the second sentence.

Section 10 of S.L. 2002, ch. 94 is compiled as § 19-1904.

Sections 2 and 4 of S.L. 2003, ch. 19 are compiled as §§ 18-4004A and 19-2515, respectively.

Sections 1 and 3 of S.L. 2003, ch. 136 are compiled as §§ 18-4004 and 19-2515, respectively.

Section 7 of S.L. 2003, ch. 19 declared an emergency. Approved February 13, 2003.

Section 6 of S.L. 2003, ch. 136 declared an emergency. Approved March 27, 2003.

Cited in: *State v. Bean*, 109 Idaho 231, 706 P.2d 1342 (1985); *State v. Clay*, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987).

ANALYSIS

Discretion of court.
Jury not sequestered.
Separation of jury.
Swearing of officer.

Discretion of Court.

The decision whether or not to sequester a jury — like the decision on changing venue — is committed to the sound discretion of the trial judge. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Jury Not Sequestered.

Where the trial court instructed the jury not to listen to news reports or read newspaper during the trial, and there was no indication that any juror was exposed to prejudicial publicity during the course of the trial, there was no abuse of discretion in the fact that the trial court failed to sequester the jury. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985). See *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

The judge did not abuse his discretion by failing to sequester the jury, where the judge undertook to protect the jury from outside influence by studiously and continuously admonishing them to avoid all discussions about the case and to refrain from reading or listening to any media reports during the trial, and the record was devoid of any suggestion that the jury actually was exposed to prejudicial information or other improper influence during the trial. *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986).

Separation of Jury.

Where defendant in a murder case shows the jury have separated in violation of the statute, he has made sufficient prima facie showing to entitle him to a new trial and to shift burden on to state of showing clearly and beyond reasonable doubt that nothing transpired during separation, or on account of separation, that did or could prejudice defendant, and if the state succeeds in making such showing, a new trial should be denied. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905).

In absence of evidence of misconduct mere separation of jury during progress of trial is not objectionable. *State v. Chacon*, 36 Idaho 148, 209 P. 889 (1922), overruled on other grounds, *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

In a prosecution for lewd conduct with a child under 16 years of age, even if the trial court erred in allowing the jury to separate

during deliberations, the error, if any, was not preserved for appeal where no objection was made to the separation procedure, and the separation was not shown to have resulted in any prejudice or in any way tainted the proceedings, where there was no assertion of any improper contacts with the jury, no news coverage of the trial, and the separation of the jury was brief. *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988).

Swearing of Officer.

Statute speaks in mandatory terms so the record must affirmatively show that the bailiff was sworn. *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969).

Whether failure to have bailiff sworn constitutes prejudicial error depends on the circumstances of the case, and what was the jury's conduct during recess. *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969).

19-2127. Admonishment of jury on adjournments. — The jury must also, at each adjournment of the court, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them. [Cr. Prac. 1864, § 380; R.S., R.C., & C.L., § 7881; C.S., § 8967; I.C.A., § 19-2027.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922).

ANALYSIS

Appeal.

Compliance.

Presumption of compliance.

Violation.

Appeal.

Although defendant failed to make a timely objection to a district court's erroneous jury instruction about juror conduct, defendant was permitted to raise the issue on appeal; the proper standard on review was whether prejudice could have reasonably occurred, not whether it actually did occur. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Compliance.

The failure to give the admonition required by this section at each and every adjournment or recess was not prejudicial error where, on

the numerous occasions on which the court did so admonish the jury, the court always added that such admonition would apply throughout the entire trial and counsel for appellant failed to object to any of the failures to give the admonition. *State v. McKeehan*, 91 Idaho 808, 430 P.2d 886 (1967).

Presumption of Compliance.

Fact that court duly admonished the jury on each adjournment as required by this section need not be shown by the record, presumption being that the statute was complied with. *State v. Suttles*, 13 Idaho 88, 88 P. 238 (1907).

Violation.

District court erred when it instructed a jury in a criminal case that it was permitted to discuss the case during the course of the trial. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

In defendant's drug case, a court erred by instructing the jury that it could discuss the case throughout the trial because that violated Idaho Code § 19-2127 and deprived defendant of his right to a fair trial as prejudice reasonably could have occurred. *State v. Palmer*, 138 Idaho 931, 71 P.3d 1078 (Ct. App. 2003).

19-2128. Discharge of juror for illness or disability — Substitute juror. — If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterwards impaneled; provided, however, that where substitute jurors have been impaneled in the manner provided by law, such substitute juror or jurors shall be used as provided by the law authorizing the impaneling of substitute jurors. [Cr. Prac. 1864, § 381; R.S., R.C., & C.L., § 7882; C.S., § 8968; am. 1923, ch. 31, § 1, p. 34; I.C.A., § 19-2028.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Impanelment of substitute jurors, § 19-1904.

Venireman.

This section has no application to venireman who was taken sick and excused before acceptance as juror. *State v. Pettit*, 33 Idaho 326, 193 P. 1015 (1920).

Collateral References. Double jeopardy where jury is discharged before termination of trial because of illness of accused. 159 A.L.R. 750.

19-2129. Decision of questions of law. — The court must decide all questions of law which arise in the course of a trial. [Cr. Prac. 1864, § 382; R.S., R.C., & C.L., § 7883; C.S., § 8969; I.C.A., § 19-2029.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Incompetency of Witness.

Question of incompetency of witness to testify is one of law to be determined by court. *State v. Simes*, 12 Idaho 310, 85 P. 914 (1906).

19-2130. Decision of questions of law and fact — Trial for libel. — On the trial of an indictment for libel, the jury have the right to determine the law and the fact. [Cr. Prac. 1864, § 383; R.S., R.C., & C.L., § 7884; C.S., § 8970; I.C.A., § 19-2030.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Libel, § 18-4801 et seq.

19-2131. Decision of questions of law and fact in other trials — Jury bound by instructions. — On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court, questions of fact by the jury; and although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court. [Cr. Prac. 1864, § 384; R.S., R.C., & C.L., § 7885; C.S., § 8971; I.C.A., § 19-2031.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Marren, 17 Idaho 766, 107 P. 993 (1910); State v. Gilbert, 65 Idaho 210, 142 P.2d 584 (1943); Carey v. State, 91 Idaho 706, 429 P.2d 836 (1967); State v. Shannon, 95 Idaho 299, 507 P.2d 808 (1973).

ANALYSIS

Questions of law and fact.

Voir dire examination as to law.

Questions of Law and Fact.

The authority of the jury as to questions of fact is as absolute as the authority of the court with respect to questions of law. State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947).

Where there was a conflict in the evidence concerning attempted abandonment by defendants of holdup upon being confronted by proprietor with a meat cleaver, it was the province of the jury to determine whether shooting of proprietor constituted murder in the first degree or a killing in self-defense. State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, State v. Shepherd, 94 Idaho 227, 486 P.2d 82 (1971).

Voir Dire Examination As to Law.

On voir dire examination juror can not be questioned as to his attitude upon assumed principles of law. In such cases he should be governed by instructions from court. State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

19-2132. Instructions to jury — Requests — Instructions on included offenses. — (a) In charging the jury, the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused.

(b) The court shall instruct the jury with respect to a lesser included offense if:

(1) Either party requests such an instruction; and

(2) There is a reasonable view of the evidence presented in the case that would support a finding that the defendant committed such lesser included offense but did not commit the greater offense.

(c) If a lesser included offense is submitted to the jury for consideration, the court shall instruct the jury that it may not consider the lesser included offense unless it has first considered each of the greater offenses within which it is included, and has concluded in its deliberations that the defendant is not guilty of each of such greater offenses. [Cr. Prac. 1864, §§ 385-387; R.S., R.C., & C.L., § 7886; C.S., § 8972; I.C.A., § 19-2032; am. 1977, ch. 154, § 7, p. 390; am. 1988, ch. 327, § 1, p. 989.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 6 of S.L. 1977, ch. 154 contained a repeal.

Section 8 of S.L. 1977, ch. 154 declared an emergency. Approved March 28, 1977.

Cross ref. Instructions and communications with jury, I.C.R. 30.

Cited in: State v. Olsen, 103 Idaho 278, 647

P.2d 734 (1982); State v. Owsley, 105 Idaho 836, 673 P.2d 436 (1983); State v. Eisele, 107 Idaho 1035, 695 P.2d 420 (Ct. App. 1985); State v. Wheeler, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985); State v. Scroggie, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); State v. Stuart, 110 Idaho 163, 715 P.2d 833 (1985); State v. Mason, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986); State v. Trefren, 112 Idaho 812, 736 P.2d 864 (Ct. App. 1987); State v. Bolton, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991); State v. Townsend, 124 Idaho 881, 865 P.2d 972 (1993); State v. Kluss, 125 Idaho 14, 867 P.2d 247 (Ct. App. 1993); State v. Johnson,

126 Idaho 892, 894 P.2d 125 (1995); *State v. Sundquist*, 128 Idaho 780, 918 P.2d 1225 (Ct. App. 1996); *State v. Howley*, 128 Idaho 874, 920 P.2d 391 (1996); *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997); *Miller v. State*, 135 Idaho 261, 16 P.3d 937 (Ct. App. 2000); *State v. Butcher*, 137 Idaho 125, 44 P.3d 1180 (Ct. App. 2002); *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002); *State v. Sheahan*, — Idaho —, — P.3d —, 2002 Ida. App. LEXIS 90 (Ct. App. Sept. 27, 2002); *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003); *State v. Henry*, 138 Idaho 364, 63 P.3d 490 (Ct. App. 2003); *State v. Rae*, — Idaho —, 84 P.3d 586 (Ct. App. 2004).

ANALYSIS

Accomplice corroboration.
 Adequacy.
 Character of instructions.
 Constructive and nonexclusive possession.
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 Endorsement.
 Essential element of offense.
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 In general.
 Instructions regarding reaching of verdict.
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 Lesser included offenses.
 —Acquittal first instruction.
 —Acquittal first requirement.
 Necessity of request.
 —In general.
 —Failure of defendant to request.
 —Refusal to give.
 Nonprejudicial instructions.
 Notation on instructions.
 Presumption of compliance.
 Prosecutorial misconduct.
 Right to jury trial.
 Self-defense.
 Special interrogatories to jury.
 Stock instructions.

Accomplice Corroboration.

The district court must instruct the jury regarding the necessity of evidence to corroborate an accomplice's testimony, whether the evidence raises a genuine issue as to whether a witness is an accomplice, in which case the court must submit the issue to the jury for resolution, or whether it is clear that the witness is an accomplice of the defendant, in which case the court should decide the question as a matter of law and inform the jury that the witness is an accomplice. *State v. Mack*, 132 Idaho 480, 974 P.2d 1109 (Ct. App. 1999).

Adequacy.

In prosecution where defendant was found guilty by a jury of the crime of wilful conceal-

ment and at trial the jury was instructed on the charged offense of petit theft and also on the lesser included offense of wilful concealment, the instructions that were given adequately addressed the subject matter of the requested instruction on the statutory definition of negligence as set forth in I.C. § 18-101(2); an explanation of the mental state, wilfulness, which is a requisite for guilt of the crime of wilful concealment, was given to the jury; the jury was instructed that in order to find defendant guilty of wilful concealment they would have to find the state had proven beyond a reasonable doubt that defendant had wilfully concealed goods or merchandise belonging to store while still upon the premises of the store, and the jury was given a definition of "wilfully" which was drawn from, but did not recite in its entirety, the definition in I.C. § 18-101(1). These instructions are all that were required for the statutory definition of negligence in I.C. 18-101(2), and I.C. 18-101(2) not law that governed defendant's guilt or innocence. There was no need for an instruction giving that definition of negligence to support her defense that she did not act wilfully; her contention that she was merely negligent was properly a subject for closing argument, but did not necessitate a separate jury instruction. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

If the jury instructions given, considered as a whole, fairly and accurately present the issues and state the applicable law, then no error is committed. *State v. Miller*, 130 Idaho 550, 944 P.2d 147 (Ct. App. 1997).

Character of Instructions.

Court in instructing the jury should state propositions of law concisely and intelligibly so that the jury may, without indulging in any fine-spun theories, understand what the law applicable to facts of the particular case is. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

It is not proper for court to enter into a discussion as to the weight of any specific class of evidence or the effect which should be given to the evidence by the jury as compared with any other class of evidence. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

It is the duty of court in its instructions to state rules of law applicable to the evidence and not to give a dissertation on what some may conceive to be policy of the law. *State v. Reel*, 19 Idaho 463, 113 P. 721 (1911).

Under provisions of this section, it is the duty of court to instruct the jury upon the law of case, but it is equally the duty of the jury to determine for itself what facts have been proved, and of this they are the sole judges. It is not the duty of court in instructing the jury to draw inferences from the facts, or to point out to the jury what inferences they might or

could draw from such facts. *State v. Jones*, 28 Idaho 428, 154 P. 378 (1916).

Instruction which in effect says that verdict should be based upon operation of mental processes and exercise of judgment is not prejudicial error. *State v. Bubis*, 39 Idaho 376, 227 P. 384 (1924).

A trial judge is required to charge the jury with "all matters necessary for their information," and this includes presenting the jury with the law as applied to the defendant's theory of justification or excuse. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

Since a trial judge must charge the jurors with all matters of law necessary for their information, a defendant is entitled to instructions on rules of law material to the determination of the defendant's guilt or innocence. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

A requested instruction on governing law must be given where a reasonable view of the evidence would support the defendant's legal theory, where the subject is not adequately covered by other instructions given to the jury, and where the instruction does not constitute an impermissible comment on the evidence. If the foregoing criteria are met, but the requested instruction incorrectly states the law, the trial court is under the affirmative duty to properly instruct the jury. *State v. Fetterly*, 126 Idaho 475, 886 P.2d 780 (Ct. App. 1994).

An error will be considered harmless if the appellate court finds beyond a reasonable doubt that the jury would have reached the same result in the absence of the error, and where parties maintained that issue before the court was whether inattentive driving constituted a lesser included offense of misdemeanor DUI, it was not necessary to address the issue as it was clear that the result, a conviction of defendant for DUI, would have been the same regardless of whether or not the requested instruction of inattentive driving had been given. *State v. Curtis*, 130 Idaho 525, 944 P.2d 122 (Ct. App. 1996).

Under this section the trial court must instruct the jurors on all matters of law necessary for their information and if the court deems a requested instruction correct and pertinent the instruction must be given; if not so deemed it must be refused. *State v. Miller*, 130 Idaho 550, 944 P.2d 147 (Ct. App. 1997).

Defendant's proposed jury instructions which dealt with procedures under § 18-8004(4) that must be followed prior to the administration of the breathalyzer test in order to meet the foundational requirements necessary to have the test results admitted at trial were improper because they contained matters that are not so much legal principles as factual information, and because they at-

tempted to instruct the jury on a legal standard which was inapplicable to the jury's function as the trier of fact. *State v. Ward*, 135 Idaho 400, 17 P.3d 901 (Ct. App. 2001).

Constructive and Nonexclusive Possession.

There was no question that the evidence tying defendant to the controlled substances was sufficient for a jury to infer individual guilt; the district court committed no error in instructing the jury on constructive and nonexclusive possession. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

Determination by Jury.

Where in a prosecution for lewd conduct with a minor, the court refused the defendant's requested instruction that the testimony of the minor's older sister, regarding sexual misconduct between her and the defendant, needed to be corroborated, it did not err as it was for the jury to assign the proper weight to corroborating evidence in their deliberations. *State v. Toothe*, 103 Idaho 187, 646 P.2d 429 (Ct. App. 1982).

Endorsement.

Where defendant did not argue that he was in any way prejudiced by action of trial court in failing to designate specifically in its endorsement what portion of requested instruction was given and what portion was refused, Supreme Court could not say that endorsements as made were reversibly erroneous. *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

The trial court did not fully comply with this section; however, defendant had not argued that he was in any way prejudiced by the failure of the court to endorse its rejection of defendant's jury instruction and the Idaho Court of Appeals held the error to be harmless. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

Essential Element of Offense.

Where proof of refusal to remove rubbish after the required form of notice has been given by the city was an element of a misdemeanor offense, it was error to omit it from the jury instructions. *State v. Roll*, 118 Idaho 936, 801 P.2d 1287 (Ct. App. 1990).

Whether a particular crime is a lesser included offense of the crime charged involves a question of law over which the appellate tribunal exercises free review. *State v. Curtis*, 130 Idaho 525, 944 P.2d 122 (Ct. App. 1996).

Where the jury was not instructed to find the element of "evading, defeating or avoiding" sales tax, which would have raised the defendant's offense to a felony as charged, and where the instruction on the misdemeanor sales tax violation did not define the crime as a lesser included offense of a felony sales tax

violation, the defendant could not be sentenced for a felony conviction. *State v. Nunez*, 133 Idaho 13, 981 P.2d 738 (1999).

In defendants' appeal of their convictions for felony injury to a child under Idaho Code § 18-1501(1), it was error for the district court to give an instruction based upon the Idaho Code § 18-101(1) definition of "willfully," because the instruction did not correctly describe the state of mind element, and may have led the jury to believe that defendants would be guilty even if they did not "intentionally or knowingly endanger" the child. *State v. Halbesleben*, — Idaho —, 75 P.3d 219 (Ct. App. 2003).

Harmless Error.

It was harmless error where, although a jury instruction incorrectly articulated the law applicable to the felony destruction of evidence because it failed to require the jury to find that the investigation was "criminal in nature" and "involved a felony offense," the evidence, undisputed and bolstered by defendant's testimony, established that the officer's investigation was a legally-authorized investigation and that, at the time of the destruction and concealment of the evidence, the investigation involved a felony, that was, the possession of methamphetamine. Furthermore, the jury must have rejected defendant's testimony that he did not swallow anything or attempt to destroy evidence because, in finding him guilty under the flawed instruction, the jury necessarily found that he "destroyed and/or concealed a clear baggy with white powder." *State v. Peteja*, — Idaho —, 83 P.3d 781 (Ct. App. 2003).

In General.

In absence of showing that such action resulted in prejudice, judgment will not be disturbed for refusal to permit defendant's counsel to examine instructions requested by state and to submit authorities in support of instructions offered. *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

It was intended by this section to charge judge with duty of instructing jurors on what he believes matters of law necessary for their information and to permit counsel to request instructions on particular points which may not be covered without such request. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

Although it was proper to refuse an instruction on accomplices which contained an incorrect statement of law, where there was evidence presenting the issue as to whether a witness was an accomplice, the defendant was entitled to have his theory of the case submitted to the jury upon proper instructions. *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968).

It was not error to refuse requested instruc-

tions which, insofar as they were correct statements of law, were covered by other instructions given. *State v. Fisk*, 92 Idaho 675, 448 P.2d 768 (1968).

This section requires that the trial court give, on its own motion, pertinent instructions by which the jury may be correctly informed with respect to the nature and elements of the crime charged and to the essential legal principles applicable to the evidence that has been admitted. *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

The requirement under this section to inform the jury of the nature and elements of the crime charged includes any lesser offenses which must also be set forth in the jury instructions so that the jury is correctly informed as to the nature and elements of the lesser included offense. *State v. Brown*, 130 Idaho 389, 941 P.2d 361 (Ct. App. 1997).

Instructions Regarding Reaching of Verdict.

Where jurors were instructed that it was the duty of each of them to consider the evidence for the purpose of arriving at a verdict "if you can do so," and that they should not be influenced to decide any question in a particular way because a majority of them, or any of them, favor such a decision, and where the jurors were further instructed that in order to reach a verdict, all of them must agree, defendant was not entitled to a more explicit instruction on the possibility of a "hung jury" in order to fulfill his right to a jury trial under either the United States Constitution or the Idaho Constitution. *State v. Smith*, 117 Idaho 225, 786 P.2d 1127 (1990).

Invited Error.

The trial bench should be cognizant that under the mandatory terms of this section the duty to instruct as to lesser included offenses exists even when as a matter of trial tactics a defendant fails to request the instruction; however, any failure by the trial court to meet this mandatory duty which is caused by defendant's express objection to or waiver of the trial court instructing as to lesser included offenses will be invited error and not considered on appeal. *State v. Lopez*, 100 Idaho 99, 593 P.2d 1003 (1979).

Subsection (b) of this section makes it the duty of the trial court to instruct the jury on lesser included offenses when they are supported by a reasonable view of the evidence, even if the court is not requested to do so. The same duty exists even if a defendant, for tactical reasons, expressly requests that no instruction on a lesser included offense be given; however, any failure by the trial court to meet this mandatory duty which is caused by defendant's express objection to or waiver of the trial court instructing as to lesser included offenses will be invited error and not

considered on appeal. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

Lesser Included Offenses.

This section makes it the duty of the trial court to instruct the jury on lesser included offenses when they are supported by a reasonable view of the evidence, even if the court is not requested to do so. *State v. Lopez*, 100 Idaho 99, 593 P.2d 1003 (1979).

The trial court's duty to instruct on a lesser included offense is subject to a limitation. Where a reasonable view of the evidence would not support a finding that the defendant is guilty of a lesser included offense, the trial court is not required to give an instruction on the lesser offense, despite the defendant's request that it do so. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

It is prejudicial error for a trial court to allow the jury to convict a defendant of a lesser included offense where there is no evidence to support all of the elements of the lesser offense. Only when a defendant may have committed all of the elements of a lesser crime can he be convicted of that crime. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983).

In prosecution for statutory rape, where lay persons unfamiliar with the underlying statutes reasonably might have interpreted the repeated references to "lesser" offenses, injury instructions, as signifying that each of the offenses listed, including lewd conduct, was less serious than the crime charged and, moreover, reasonable jurors — noting the sequence of the offenses listed and judge's statement that the crimes were different in "degree" — well could have believed that lewd conduct was the least serious of the "lesser" crimes, the jury instruction erroneously characterized the seriousness of lewd conduct in relation to the crime charged and to other included offenses. However, the error in the instruction, relating to the seriousness of the offense, did not alter the jury's choice of the crime committed and, therefore, it was harmless beyond a reasonable doubt. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

I.C.R. Rule 31(c), subsection (b) of this section and 19-2312 impute no meaning to the word "lesser" different from the word "included" and, accordingly, the doctrine of the lesser included offense is not limited to an offense less serious than the crime charged. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Special care must be taken when instructing a jury about an offense which is "included" in the crime charged but which actually carries an equal or greater potential penalty since use of the term "lesser" to describe such an offense may be misleading; moreover,

when a jury is asked to choose among several included offenses, according to the "highest degree," that term should be defined and, where multiple offenses are listed, the sequence in which they appear should not suggest an incorrect ranking of their relative severity. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Idaho Code mandates that the trial court instruct the jury on a lesser included offense requested by either party where a reasonable view of the evidence presented in the case would support a finding that the defendant committed the lesser included offense, but did not commit the offense charged. *State v. Croasdale*, 120 Idaho 18, 813 P.2d 357 (Ct. App. 1991).

Whether a particular crime is a lesser included offense of the crime charged involves a question of law over which the Court of Appeals exercises free review. *State v. Croasdale*, 120 Idaho 18, 813 P.2d 357 (Ct. App. 1991).

Where the only evidence of contact between the victim and the defendant went to anal-genital and oral-genital contacts and there was no testimony regarding any other type of touching, evidence in prosecution for lewd conduct with minor or child under age of 16 did not support proposed instructions on lesser included offenses of sexual abuse of child under age of 16 and injury to children with potential of great bodily harm, and battery. The statute pursuant to which defendant was convicted and the jury instruction (§ 18-1508) specifically includes oral-genital contact and anal-genital contact as lewd and lascivious acts. *State v. Fodge*, 121 Idaho 192, 824 P.2d 123 (1992).

Bar and bench should be aware that the 1988 amendment to this section appears to put the burden on counsel to affirmatively request jury instructions on lesser included offenses. Idaho Criminal Rule 30, on the other hand, does not appear to require counsel to offer jury instructions on lesser included offenses. *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

Where court's instructions allowed jury to find defendant not guilty of lewd conduct with a minor, but guilty of sexual abuse of a minor based upon proof of facts different from those alleged in the information for the lewd conduct charge, case was vacated and remanded. *State v. Colwell*, 124 Idaho 560, 861 P.2d 1225 (Ct. App. 1993).

Requirement in trial court's instructions that jury acquit defendant of each greater offense before considering the next lesser included offense (acquittal first instruction) did not violate the Due Process Clause of the United States Constitution or subsection (c) of this section. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 596 (1993).

District court did not abuse its discretion in

deciding not to give a jury instruction on involuntary or voluntary manslaughter as lesser offenses of first-degree murder where evidence showed that a 12 gauge shotgun was fired into an occupied room exhibiting a wanton disregard for human life which might lead a jury to infer "malice aforethought" which is an element of both first and second-degree murder but not to involuntary manslaughter; additionally there was no evidence to indicate the murder took place in the heat of passion. *State v. Grube*, 126 Idaho 377, 883 P.2d 1069 (1994), cert. denied, 514 U.S. 1098, 115 S. Ct. 1828, 131 L. Ed. 2d 749 (1995).

Where defendant was convicted of first degree kidnapping, an application for past judgment relief because "enticing" instruction would not have been justified upon a reasonable view of the evidence presented at defendant's trial, he was not prejudiced by the untimeliness of his counsel's request for the proposed instruction on the lesser included offense of enticing a child. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

Even if the court erred in not providing the requested jury instructions for the lesser included offenses, the error was harmless in light of the acquittal the first instruction required pursuant to subsection (c) of this section. *State v. Rosencrantz*, — Idaho —, 927 P.2d 921 (Ct. App. 1996), aff'd, 130 Idaho 666, 946 P.2d 628 (1997).

The plain language of this section does not restrain a trial court from instructing a jury on lesser included offenses when such instructions are warranted but are not requested by either of the parties. *State v. Watts*, 131 Idaho 782, 963 P.2d 1219 (Ct. App. 1998).

In a trial for first-degree murder, the trial court did not err in refusing to give an instruction on the lesser included offense of voluntary manslaughter, as there was no evidence at all which could reduce the crime to voluntary manslaughter. *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998).

Where the jury was instructed on first degree murder, second degree murder, and voluntary manslaughter, and found defendant guilty of second degree murder, defendant failed to demonstrate that he was prejudiced by the trial court's denial of his request for an involuntary manslaughter instruction. *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000).

Although the district court instructed the jury on several alternate theories under which defendant could be guilty of the crime of injury to child, these alternatives all included the element, "under circumstances likely to produce great bodily harm or death," which improperly limited the jury to convicting defendant of felony injury to child, and there was a reasonable view of the evidence which would support also giving the misde-

meanor injury to child instruction. *State v. Young*, 138 Idaho 370, 64 P.3d 296 (2002).

—Acquittal First Instruction.

This section has become known as the acquittal first requirement of the Idaho Code. If an acquittal first instruction is presented to the jury, the jury should consider the lesser included offenses only if the jury unanimously finds the defendant is not guilty of the greater offense. *State v. Miller*, 131 Idaho 288, 955 P.2d 603 (Ct. App. 1997).

In application of subsection (c) of this section under what has become known as the "acquittal first" doctrine, the trial court's failure to include the involuntary manslaughter instruction at defendant's trial for voluntary manslaughter was harmless error. *State v. Ransom*, 137 Idaho 560, 50 P.3d 1055 (Ct. App. 2002).

—Acquittal First Requirement.

Even assuming that the misdemeanor offenses of exhibition or use of a deadly weapon, aiming a firearm at others, and discharge of arms aimed at another were lesser included offenses which the district court was obligated to offer to the jury, any error in the district court's failure to give the instructions was harmless under the "acquittal first" requirement of subsection (c) if this section. Jury would not have considered the lesser included misdemeanor offenses because it had unanimously concluded defendant was guilty of felony aggravated assault (a lesser included offense than the one charged of assault with intent to commit a serious felony). *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996).

Where the district court instructed the jury in an aggravated battery trial on the lesser included offense of injuring another by discharge of an aimed firearm, and also gave the jury an "acquittal first" instruction, the jury's unanimous verdict convicting the defendant of aggravated battery foreclosed it from considering whether he was guilty of any lesser-included offenses, and any potential error in the district court's failure to give requested instructions on additional lesser-included offenses was harmless. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Necessity of Request.

In felony cases court should instruct the jury in writing on all the material issues of case, but his failure to do so is not reversible error in absence of a request for the charge, and a notation of the refusal thereof. *State v. Harness*, 10 Idaho 18, 76 P. 788 (1904).

Assignment of error based on failure to give instruction will not be reviewed on appeal where record fails to show that a request for the instruction was made. *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932).

Although no request is made for instructions, it is the duty of the court to instruct the jury with respect to the general principles of law pertinent to the case, and a failure to do so constitutes reversible error. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

In the absence of a request, the court's failure to instruct upon a particular point can not be assigned as error. *State v. Patterson*, 60 Idaho 67, 88 P.2d 493 (1939).

In the absence of a request for such an instruction, it was not error for the court to fail to instruct the jury on circumstantial evidence, especially where the evidence relied upon by the prosecution was direct evidence and not circumstantial. *State v. Puckett*, 88 Idaho 546, 401 P.2d 784 (1965).

Refusal of trial court to give instruction concerning voluntary manslaughter in second degree murder trial cannot be assigned as error where defendant did not submit a request encompassing a correct statement of the law on which he desired the jury to be instructed. *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

Where defendant contended trial court failed to instruct the jury concerning the distinction between direct and circumstantial evidence, court said that while it would have been better practice to have given instruction on distinction, in absence of a request for such instruction, there was no error. *State v. Goodrick*, 95 Idaho 773, 519 P.2d 958 (1974).

It is not the duty of the trial court, on its own motion, to give explanatory instructions. *State v. Morris*, 97 Idaho 420, 546 P.2d 375 (1976).

—In General.

If a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury but it is under no duty to do so. However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

—Failure of Defendant to Request.

The defendant failed to ask the trial court for an instruction on necessity; the trial court was not obligated to sua sponte instruct the jury on this defense. *State v. Eastman*, 122 Idaho 87, 831 P.2d 555 (1992).

The defendant is under the obligation to bring his or her theory or theories to the attention of the trial court; the trial court is not obligated to determine on its own what theories to instruct the jury on. *State v.*

Eastman, 122 Idaho 87, 831 P.2d 555 (1992).

Mentioning before trial that counsel is contemplating the possibility of requesting an instruction is not a substitute for actually requesting it. *State v. Setzer*, 136 Idaho 477, 36 P.3d 829 (Ct. App. 2001).

—Refusal to Give.

Where, in a prosecution for obstructing a police officer and committing a battery upon a police officer, there was a question of fact whether the defendant had made a lunge at one officer, justifying the other in grabbing the defendant from behind, and there also was a related question whether the officers at any time used force to an excessive degree, the magistrate's refusal to instruct the jury on the right of a citizen to resist excessive force by police constituted reversible error entitling the defendant to a new trial. *State v. Spurr*, 114 Idaho 277, 755 P.2d 1315 (Ct. App. 1988).

In a trial where an ex-felon was accused of injuring another by discharge of a firearm, the judge erred in not directly answering a juror's question as to whether defendant's unlawful possession of a firearm would negate his self-defense claim; therefore, the defendant was entitled to a new trial. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

Where there was a reasonable view of the evidence which would have allowed the jury to find that the defendant was guilty of joy riding, but that he was not guilty of grand theft (auto), the court erred by refusing to give a joy riding instruction as the defendant requested. *State v. Tomes*, 118 Idaho 952, 801 P.2d 1303 (Ct. App. 1990).

Trial court erred in refusing to give jury instruction on the lesser included offense of exhibiting a dangerous weapon at trial of defendant convicted of felony aggravated assault, where defendant, following a fist fight with complaining witnesses, pointed a pistol at them, made threatening remarks and then fired a shot into the ground nearby. *State v. Croasdale*, 120 Idaho 18, 813 P.2d 357 (Ct. App. 1991).

Where the trial court found that the specific intent instructions requested by the defendant were adequately covered by the instructions given by the court, taken as a whole, and in addition, the trial court found that the jury was carefully instructed on intent, and to have given the requested instructions dealing with diminished capacity, unsoundness of mind, and other similar language as set forth in defense requested instructions would have confused the jury because there was absolutely no evidence whatsoever presented relating to defendant's mental condition that would warrant giving these instructions, the instructions given adequately informed the jury of the law applicable to the issues in

question. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

The instruction requested by defendant on possession of paraphernalia only served to suggest a crime that could have been, but was not, directly or indirectly charged. Therefore, the court was not required to give any instruction about the crime of possession of paraphernalia. *State v. Kodesh*, 122 Idaho 756, 838 P.2d 885 (Ct. App. 1992).

The trial court did not err by refusing the instructions submitted by defendant on the issue of mental state where the instruction given by the trial court informed the jury of the classes of people capable of committing crimes, the necessity of finding that defendant manifest the mental state of malice aforethought in order to convict him of murder, and the need to find that defendant possessed specific intent in order to convict him of the crime of second degree murder. *State v. Moore*, 126 Idaho 208, 880 P.2d 238 (1994).

Where intent was the only element of the State's case not proven through direct evidence, it was not error for the trial court to refuse defendant's requested instruction on circumstantial evidence. *State v. Moore*, 126 Idaho 208, 880 P.2d 238 (1994).

In prosecution for felony injury to a child, the district court did not err in refusing to give defendant's requested jury instruction regarding evidence that an abnormal mental condition prevented him from forming the mental state that is an element of the crime. *State v. Patterson*, 126 Idaho 227, 880 P.2d 257 (Ct. App. 1994).

The trial court properly refused to give a Holder instruction, because the case is not based entirely on circumstantial evidence. *State v. Jones*, 125 Idaho 477, 873 P.2d 122 (1994), cert. denied, 513 U.S. 901, 115 S. Ct. 260, 130 L. Ed. 2d 180 (1994).

Nonprejudicial Instructions.

Even though an instruction is erroneous and ordinarily the error would be material, yet if the evidence of defendant's guilt is such as ordinarily produces moral certainty or conviction in an unprejudiced mind, and the result would not have been different had the instruction been omitted, the case will not be reversed because of such erroneous instruction. *State v. Brill*, 21 Idaho 269, 121 P. 79 (1912).

It is not error to refuse to give a requested instruction where the same is fully covered by instructions given. *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

Where requested instruction covering issues raised by character evidence is erroneous it is not prejudicial error for trial court to

fail to give a correct one on such point, since character evidence ordinarily is not sufficiently vital to defense as to require instruction thereon. *State v. Dowell*, 47 Idaho 457, 276 P. 39, 68 A.L.R. 1061 (1929).

A requested instruction having no relation to the facts and merely stating an abstract principle of law may be refused without error. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

Notation on Instructions.

Court should not indicate to the jury what instructions are given of his own motion, or at the instance of counsel for plaintiff or defendant. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

Authorities should not be cited at foot of instructions given to jury; such citations should be detached before instructions are handed to jury to be taken to jury room. *State v. Sage*, 22 Idaho 489, 126 P. 403, 1914B Ann. Cas. 251 (1912).

Where jury could not, upon the record, have found any other verdict than that of guilty, giving of an instruction upon which there appeared at the end of word "guilty," instead of the word "given," followed by name of trial judge, is not reason for reversal. *State v. Grigg*, 25 Idaho 405, 138 P. 506 (1914).

A judge does not comply with the statute by simply making a scroll or pencil mark across the face of disapproved instructions. *State v. Buster*, 28 Idaho 110, 152 P. 196 (1915).

Presumption of Compliance.

In the absence of any showing to the contrary, it will be presumed that court charged the jury as provided in this section. *State v. O'Brien*, 13 Idaho 112, 88 P. 425 (1907).

Prosecutorial Misconduct.

The prosecutor's improper description of the instructions on lesser included offenses as defense counsel's attempt to plea bargain did not carry sufficient residual impact, after the trial judge's ruling and admonition, to constitute reversible error. *State v. Missamore*, 114 Idaho 879, 761 P.2d 1231 (Ct. App. 1988) (decision prior to 1988 amendment).

Where the trial court found that the specific intent instructions requested by the defendant were adequately covered by the instructions given by the court, taken as a whole, and in addition, the trial court found that the jury was carefully instructed on intent, and to have given the requested instructions dealing with diminished capacity, unsoundness of mind, and other similar language as set forth in defense requested instructions would have confused the jury because there was absolutely no evidence whatsoever presented relating to defendant's mental condition that would warrant giving these instructions, the instructions given adequately informed the

jury of the law applicable to the issues in question. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

The instruction requested by defendant on possession of paraphernalia only served to suggest a crime that could have been, but was not, directly or indirectly charged. Therefore, the court was not required to give any instruction about the crime of possession of paraphernalia. *State v. Kodesh*, 122 Idaho 756, 838 P.2d 885 (Ct. App. 1992).

Right to Jury Trial.

The 1988 revision of this section does not violate the right to a jury trial as it is guaranteed by Idaho Const., Art. I, § 7. *State v. Pratt*, 125 Idaho 594, 873 P.2d 848, cert. denied, 513 U.S. 1005, 115 S. Ct. 521, 130 L. Ed. 2d 426 (1994).

Self-Defense.

Where defendant asserted that he inflicted the knife wound while acting in self-defense, which claim was supported largely by his own testimony, he was entitled to instructions on the law of self-defense. *State v. Allen*, 113 Idaho 676, 747 P.2d 85 (Ct. App. 1987).

Court, in defendant's domestic battery case, did not err by denying defendant's request for a self-defense instruction where defendant presented no evidence that defendant reasonably feared some degree of bodily harm from the victim. *State v. Hoover*, 138 Idaho 414, 64 P.3d 340 (Ct. App. 2003).

Special Interrogatories to Jury.

The practice of requiring a jury to answer special interrogatories, or to render a special verdict, in criminal cases is not to be encouraged, except in cases contemplated by § 19-2304. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

Stock Instructions.

Under this section requiring the judge to charge the jury on what he believes to be matters of law necessary for their information, it is the general practice of attorneys to rely on the judge, of his own motion, to give what are commonly referred to as "stock instructions" in criminal cases covering such questions as "burden of proof," "presumption of innocence" and "reasonable doubt," and to advise the jury as to the nature and elements of the crime charged. *State v. Freeman*, 85 Idaho 339, 379 P.2d 632 (1963).

Collateral References. Definition of legal or technical term, necessity of repeating, in different parts of instructions in which it is employed. 7 A.L.R. 135.

Character, propriety of instructions as to the significance of evidence concerning, as an element bearing upon the question of reasonable doubt. 10 A.L.R. 8; 68 A.L.R. 1068.

Alibi, instructions disparaging defense of. 14 A.L.R. 1426; 67 A.L.R. 122; 146 A.L.R. 1377.

Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence. 15 A.L.R. 1049.

Duty of court to instruct as to right of jury to make recommendation of mercy. 17 A.L.R. 1123; 87 A.L.R. 1362; 138 A.L.R. 1230.

Degrees of crime or included offenses, duty to charge as to reasonable doubt as between. 20 A.L.R. 1258.

Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to lesser degree. 21 A.L.R. 603; 27 A.L.R. 1097; 102 A.L.R. 1019.

Conspiracy, instruction as to, where there is no charge of conspiracy in indictment. 66 A.L.R. 1311.

Air navigation, instructions in criminal cases. 69 A.L.R. 338; 83 A.L.R. 412.

Propriety of instructions which permit conviction notwithstanding difference between jurors as to which of two or more contradictory facts, each of which is consistent with guilt, was established by the evidence. 72 A.L.R. 154.

Propriety of instruction or requested instruction requiring jury in criminal case to take the law from the court, or advising them as to their duty in that regard. 72 A.L.R. 899.

Accused, right to and propriety of instruction as to credibility of. 85 A.L.R. 523.

Argument of defendant's counsel in criminal case, criticism of in judge's charge to jury. 86 A.L.R. 899.

Instructions in prosecution for violation of Blue Sky Laws. 87 A.L.R. 162.

Instruction on circumstantial evidence in criminal case. 89 A.L.R. 1379.

Maxim, "falsus in uno, falsus in omnibus," propriety and correctness of instructions regarding. 90 A.L.R. 74.

Definition of term preponderance or weight of evidence. 93 A.L.R. 155.

Comment by court suggesting that jury may take into consideration accused's failure to testify. 94 A.L.R. 701.

Scope and application of rule which permits judge in criminal case to comment on weight or significance of evidence. 95 A.L.R. 785; 113 A.L.R. 1308.

Instructions in prosecution for homicide in connection with use of automobile. 99 A.L.R. 819.

Exculpatory or mitigating statements in confession or admission introduced by prosecution, duty of court to instruct as to presumption of truthfulness of. 116 A.L.R. 1459.

Alibi, duty of court to instruct on subject. 118 A.L.R. 1303.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring cautionary instruction as to testimony. 119 A.L.R. 689.

Good or bad character of witness, instructions as to effect of, on their credibility. 120 A.L.R. 1443.

Instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the prosecution or because he fails to call such person as witness. 131 A.L.R. 694.

Individual juror, necessity of instruction as to reasonable doubt on part of. 137 A.L.R. 394.

Recommendation of mercy. 138 A.L.R. 1230.

Common knowledge, propriety of instructions on matters of. 144 A.L.R. 932.

"Actual doubt," use of term in instruction on reasonable doubt. 147 A.L.R. 1046.

Knowledge, test of, propriety of instruction as to. 147 A.L.R. 1052.

Right of defendant in prosecution for per-

jury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury. 156 A.L.R. 499.

Comments in judge's charge to jury disparaging expert testimony. 156 A.L.R. 530.

Dying declarations, instructions defining weight and value of, as evidence. 167 A.L.R. 158.

Duty in instructing jury to explain and define offense charged. 169 A.L.R. 315.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Propriety of, or prejudicial effect of omitting or giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge. 92 A.L.R.3d 866.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 A.L.R.4th 120.

19-2133. Retirement of jury — Oath of bailiff. — After hearing the charge, the jury may either decide in court or may retire for deliberation. If they do not agree without retiring, an officer must be sworn to keep them together in some private and convenient place, and not permit any person to speak or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court. [Cr. Prac. 1864, § 388; R.S., R.C., & C.L., § 7887; C.S., § 8973; I.C.A., § 19-2033.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Judge communicating with jury.
Separate lodgings.

Judge Communicating with Jury.

Where judge, after the jury have retired for deliberation, goes to jury room upon request

of juror, in absence of defendant and his counsel, and has a conversation with jury or juror relative to the case, or with reference to their verdict, such conduct constitutes reversible error. *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904).

Separate Lodgings.

Lodging jurors over night in three adjoining rooms on the same floor of hotel, at all times under care and control of bailiff, without communication with anyone, was not error. *State v. Leavitt*, 44 Idaho 739, 260 P. 164 (1927).

19-2134. Commitment of defendant pending trial. — When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly. [Cr. Prac. 1864, § 389; R.S., R.C., & C.L., § 7888; C.S., § 8974; I.C.A., § 19-2034.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2135. Absence of prosecuting attorney — Appointment of substitute. — If the prosecuting attorney fails to attend the trial, the court must appoint some attorney at law to perform the duties of the prosecuting attorney on such trial. [R.S., R.C., & C.L., § 7889; C.S., § 8975; I.C.A., § 19-2035.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Appointment of special prosecutor, see § 31-2603.

CHAPTER 22

CONDUCT OF JURY

SECTION.

19-2201. Jury room to be provided by commissioners.

19-2202. Provision of food and lodging for jury.

19-2203. Papers which may be taken by jury.

19-2204. Return of jury for information.

19-2205. Discharge of jury for illness or accident.

SECTION.

19-2206. When jury may be discharged.

19-2207. Retrial after discharge of jury.

19-2208. Adjournment during absence of jury.

19-2209. Final adjournment of the court discharges the jury.

19-2210. Expenses to be paid by what county.

19-2201. Jury room to be provided by commissioners. — A room must be provided by the commissioners of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery. If the commissioners neglect, the court may order the sheriff to do so, and the expenses incurred by him in carrying the order into effect, when certified by the court, are a county charge. [Cr. Prac. 1864, § 390; R.S., R.C., & C.L., § 7900; C.S., § 8976; I.C.A., § 19-2101.]

Cross ref. Trial jurors, I.C.R. 24.

Cited in: *Schmelzel v. Board of County Comm'rs*, 16 Idaho 32, 100 P. 106 (1909).

Collateral References. Propriety of permitting jury to take X-ray picture, introduced in evidence, with them in the jury room. 10 A.L.R.2d 918.

Separation of jury in criminal case. 21

A.L.R.2d 1088; 72 A.L.R.3d 100; 72 A.L.R.3d 131; 72 A.L.R.3d 248.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 A.L.R.3d 1012.

Separation of jury in criminal case after submission of cause — Modern cases. 72 A.L.R.3d 248.

19-2202. Provision of food and lodging for jury. — While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging. [Cr. Prac. 1864, § 391; R.S., R.C., & C.L., § 7901; C.S., § 8977; I.C.A., § 19-2102.]

Cited in: State v. Clay, 112 Idaho 261, 731 P.2d 804 (Ct. App. 1987).

Barber Service.

Expense incurred by order of the court for cutting hair and shaving jurors while the jury was kept together in the progress of trial is

not such necessary expense incident to and necessary in administration of justice as to become a county charge. *Schmelzel v. Board of County Comm'rs*, 16 Idaho 32, 100 P. 106, 21 L.R.A. (n.s.) 199, 133 Am. St. R. 89, 17 Ann. Cas. 1226 (1909).

19-2203. Papers which may be taken by jury. — Upon retiring for deliberation, the jury may take with them all exhibits and all papers (except depositions) which have been received in evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person. [Cr. Prac. 1864, §§ 392, 393; R.S., & R.C., § 7902; am. 1911, ch. 23, § 1, p. 49; reen. C.L., § 7902; C.S., § 8978; I.C.A., § 19-2103.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Moon, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911).

ANALYSIS

Construction.

Exhibits.

Failure to object.

Instructions not given.

Construction.

Jury may take with them to the jury room written instructions given by the court, but they are not obliged to do so. *State v. Grigg*, 25 Idaho 405, 137 P. 371 (1914).

Exhibits.

This section, prior to its amendment in 1911, did not allow exhibits, other than writings, to be taken to jury room upon retirement of jury. *State v. Crea*, 10 Idaho 88, 76 P. 1013 (1904); *State v. Foell*, 37 Idaho 722, 217 P. 608 (1923).

While court doubted wisdom of taking to jury room exhibit alleged to be an intoxicant, it held that this section permitted it to be

done. *State v. Foell*, 37 Idaho 722, 217 P. 608 (1923).

In prosecution for attempted poisoning it was not error to allow exhibit of accused's handwriting and poison register of drug store to be taken to jury room. *State v. Healey*, 45 Idaho 73, 260 P. 694 (1927).

During its deliberations, the jury sought and obtained permission from the court to open and examine a sealed bag containing three small bindles of illegal drugs; the directive of the district judge in response to the jury's request was, "You may open and examine the exhibits, but do nothing more"; the district judge acted within his discretion in granting the jury's request. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

Failure to Object.

Where the district judge discussed with counsel how he proposed to allow a viewing of a videotape by the jury, and counsel agreed without objection, there was no ruling and no resultant error to be reviewed on appeal even though the procedure was faulty. *State v. Barnett*, 133 Idaho 231, 985 P.2d 111 (1999).

Instructions Not Given.

It is error to permit to be taken into jury room requested but refused instructions. *State v. Buster*, 28 Idaho 110, 152 P. 196 (1915).

19-2204. Return of jury for information. — After the jury have retired for deliberation, if there is any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney and the defendant or his

counsel, or after they have been called. [Cr. Prac. 1864, § 394; R.S., R.C., & C.L., § 7903; C.S., § 8979; I.C.A., § 19-2104.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Absence of defense counsel.

Necessity of request.

—In general.

—Refusal to give.

Presence of judge in jury room.

Reading of testimony.

Absence of Defense Counsel.

Where jury requested that judge define "control" as used in instruction related to possession of marijuana under § 37-2732 and judge, after unsuccessfully trying to locate defense counsel, conferred with prosecuting attorney and typed out definition for jury, it was harmless error for judge to so act, despite fact that he violated procedure under this section, since the information filed against defendant contained the correct definition. *State v. Randolph*, 102 Idaho 153, 627 P.2d 782 (1981).

Necessity of Request.

—In General.

If a jury expresses doubt or confusion on a point of law correctly and adequately covered in a given instruction, the trial court in its discretion may explain the given instruction or further instruct the jury but it is under no duty to do so. However, if a jury makes explicit its difficulties with a point of law pertinent to the case, thereby revealing a defect, ambiguity or gap in the instructions, then the trial court has the duty to give such additional instructions on the law as are reasonably necessary to alleviate the jury's doubt or confusion. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

—Refusal to Give.

In a trial where an ex-felon was accused of injuring another by discharge of a firearm, the judge erred in not directly answering a juror's question as to whether defendant's unlawful possession of a firearm would negate his self-defense claim, therefore, the defendant was entitled to a new trial. *State v. Pinkney*, 115 Idaho 1152, 772 P.2d 1246 (Ct. App. 1989).

Presence of Judge in Jury Room.

It is reversible error for the judge to enter jury room upon the request of a juror, after

jury has retired for deliberation, and, in the absence of defendant and his counsel, to address jury in answer to questions put by them as to any matter connected with case or their verdict. *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904).

All communication between judge and jury should take place in open court in the presence of parties litigant or their counsel. *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904).

Reading of Testimony.

Defendant had no right to complain that testimony was read to jury in the absence of prosecuting attorney. *State v. Leavitt*, 44 Idaho 739, 260 P. 164 (1927).

Where jury requested reading of evidence of complaining witness and defendant and after reading of complaining witness's testimony, juror stated that jury wanted only certain parts of defendant's testimony, it was not error for the court to have only those parts of defendant's testimony read. *State v. Leavitt*, 44 Idaho 739, 260 P. 164 (1927).

There is no error in reading portion of testimony at request of jury, when prosecuting attorney and counsel for defense are present. *State v. Jester*, 46 Idaho 561, 270 P. 417 (1928).

Where the jury during its deliberations sent the judge a note requesting the entire trial transcript, and the judge, after conferring with counsel for both prosecution and defense, sent a note, with the approval of both counsel, stating that the transcript could not be produced for several days, but that the court reporter could read those portions which were necessary, such procedure did not violate this section, since the judge's response clearly indicated his intention to comply with this section, if necessary, and his failure to call the jury into the courtroom was, if error, not objected to. *State v. Hernandez*, 102 Idaho 349, 630 P.2d 141 (1981).

The trial court must attempt to meet any reasonable requests by the jury for the re-reading of testimony, but must always exercise its discretion to ensure that a party to the litigation is not prejudiced. *State v. Couch*, 103 Idaho 205, 646 P.2d 447 (Ct. App. 1982).

Where the trial court allowed the jury to return to the court to rehear the transcript of a recorded telephone conversation between the investigating officer and the defendant concerning evidence which was not conflicting, it did not err as the jury had a right to review such evidence. *State v. Couch*, 103 Idaho 205, 646 P.2d 447 (Ct. App. 1982).

Defendant failed to demonstrate that the district court's re-reading of the witness's tes-

timony to the jury was error, where he failed to provide any evidence that the jury's request was for an improper purpose. *State v.*

Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

19-2205. Discharge of jury for illness or accident. — If, after the retirement of the jury, one (1) of them be taken so sick as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept for deliberation, the jury may be discharged. [Cr. Prac. 1864, § 395; R.S., R.C., & C.L., § 7904; C.S., § 8980; I.C., § 19-2105.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2206. When jury may be discharged. — Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree. [Cr. Prac. 1864, § 396; R.S., R.C., & C.L., § 7905; C.S., § 8981; I.C.A., § 19-2106.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

discretionary with court, and it is not necessary that record affirmatively show express consent to such discharge, or necessity which induced the same, *State v. Jorgenson*, 3 Idaho 620, 32 P. 1129 (1893); and action of trial court in discharging jury will not be disturbed in absence of a palpable abuse of discretion. *State v. Crump*, 5 Idaho 166, 47 P. 814 (1897).

Discretion of Court.

Exercise of the power of discharging jury is

19-2207. Retrial after discharge of jury. — In all cases where a jury are discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged from the indictment during the progress of the trial or after the cause is submitted to them, the cause may be again tried at the same or another term. [Cr. Prac. 1864, § 397; R.S., R.C., & C.L., § 7906; C.S., § 8982; I.C.A., § 19-2107.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

(since repealed), included separate and new prosecutions but was not meant to include the continuation of a prosecution by retrial of unresolved charges, as in the instant case, and by allowing a retrial, former § 18-301 and this section could be reconciled harmoniously. *State v. Seamons*, 126 Idaho 809, 892 P.2d 484 (Ct. App. 1995).

Retrial as Continuation.

The term "prosecution," as used in § 18-301

19-2208. Adjournment during absence of jury. — While the jury are absent, the court may adjourn from time to time, as to other business, but

it must nevertheless be open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. [Cr. Prac. 1864, § 398; R.S., R.C., & C.L., § 7907; C.S., § 8983; I.C.A., § 19-2108.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2209. Final adjournment of the court discharges the jury. — A final adjournment of the court discharges the jury. [Cr. Prac. 1864, § 399; R.S., R.C., & C.L., § 7908; C.S., § 8984; I.C.A., § 19-2109.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2210. Expenses to be paid by what county. — When two (2) or more counties are joined for judicial purposes, the expense of the trial of a cause must be paid by the county where the offense is alleged to have been committed. [Cr. Prac. 1864, § 400; R.S., R.C., & C.L., § 7909; C.S., § 8985; I.C.A., § 19-2110.]

CHAPTER 23

VERDICT

SECTION.

- 19-2301. Return of jury.
- 19-2302. Presence of defendant.
- 19-2303. Manner of taking verdict.
- 19-2304. General and special verdicts.
- 19-2305. Forms of general verdict.
- 19-2306. Special verdict defined.
- 19-2307. Special verdict, how rendered.
- 19-2308. Form of special verdict.
- 19-2309. Judgment on special verdict.
- 19-2310. Defective special verdict — New trial.
- 19-2311. Jury to find degree of crime.

SECTION.

- 19-2312. Conviction of included offense.
- 19-2313. Verdict against joint defendants.
- 19-2314. Reconsideration of verdict.
- 19-2315. Judgment on informal verdict.
- 19-2316. Polling the jury.
- 19-2317. Recording verdict.
- 19-2318. Discharge or detention of defendant on acquittal.
- 19-2319. Committal of defendant on conviction.
- 19-2320. [Repealed.]

19-2301. Return of jury. — When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Their names must then be called, and if all do not appear, the rest must be discharged without giving a verdict. In that case the action may be again tried at the same or another term. [Cr. Prac. 1864, § 401; R.S., R.C., & C.L., § 7915; C.S., § 8986; I.C.A., § 19-2201.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Verdict, I.C.R. 31.

Collateral References. 75A Am. Jur. 2d, Trial, §§ 1750 — 1927.

23A, 24 C.J.S., Criminal Law, §§ 1395 — 1419, 1500, 1501, 1512.

Absence of accused at return of verdict in felony case. 23 A.L.R.2d 456.

Absence of judge from courtroom during criminal trial prior to time of reception of verdict. 34 A.L.R.2d 683.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict. 40 A.L.R.2d 1119.

Requirement of unanimity of verdict in proceedings to determine sanity of one accused of crime. 42 A.L.R.2d 1468.

Accused's right to poll jury. 49 A.L.R.2d 619.

Admissibility of evidence as to jury's statements, during deliberations, as to facts not introduced in new evidence. 58 A.L.R.2d 556.

Reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict. 87 A.L.R.2d 849.

Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal. 91 A.L.R.2d 1120.

Haste or shortness of time in which jury

reached verdict in criminal case. 91 A.L.R.2d 1238.

Time jury may be kept together on disagreement in criminal case. 93 A.L.R.2d 627.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 A.L.R.3d 1461.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information. 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together. 22 A.L.R.3d 717.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case. 25 A.L.R.3d 1149.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 A.L.R.3d 769.

Validity and efficacy of accused's waiver of unanimous verdict. 97 A.L.R.3d 1253.

19-2302. Presence of defendant. — If indicted for a felony, the defendant must, before the verdict is received, appear in person. If for a misdemeanor, the verdict may be rendered in his absence. [Cr. Prac. 1864, § 402; R.S., R.C., & C.L., § 7916; C.S., § 8987; I.C.A., § 19-2202.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Presence of Defendant.

In cases of felony, defendant should be present at rendition of verdict and record should show that fact. *State v. Watkins*, 7 Idaho 35, 59 P. 1106 (1900).

19-2303. Manner of taking verdict. — When the jury appear they must be asked by the court or clerk whether they have agreed upon their verdict, and if the foreman answers in the affirmative they must, on being required, declare the same. [Cr. Prac. 1864, § 403; R.S., R.C., & C.L., § 7917; C.S., § 8988; I.C.A., § 19-2203.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2304. General and special verdicts. — The jury may render a general verdict, or, when they are in doubt as to the legal effect of the facts proved, they may, except upon an indictment for libel, find a special verdict. [Cr. Prac. 1864, § 404; R.S., R.C., & C.L., § 7918; C.S., § 8989; I.C.A., § 19-2204.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Interrogatories.

Leniency.

Interrogatories.

Where the record did not disclose the exist-

ence of circumstances to bring the matter within the purview of the statute, the refusal of trial court to submit special interrogatories to the jury was not error. *State v. Cutler*, 94 Idaho 295, 486 P.2d 1008 (1971).

Leniency.

Jury's recommendation for leniency, though entitled to great consideration, has no binding effect on the court. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

19-2305. Forms of general verdict. — A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or acquittal of the offense charged in the indictment. [Cr. Prac. 1864, § 405; 1875, p. 361, § 403; R.S., R.C., & C.L., § 7919; C.S., § 8990; I.C.A., § 19-2205; am. 1982, ch. 368, § 8, p. 919.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 6 and 9 of S.L. 1982, ch. 368 are compiled as §§ 18-310 and 19-2522, respectively, and § 7 was repealed.

Section 14 of S.L. 1982, ch. 368 read: "This act shall be in full force and effect and shall apply to persons against whom a criminal complaint is filed on or after July 1, 1982."

Cited in: *State v. Chauncey*, 97 Idaho 756, 554 P.2d 934 (1976); *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

ANALYSIS

Involuntary manslaughter verdict.

Verdict against joint defendants.

Involuntary Manslaughter Verdict.

Where jury by its verdict found defendant guilty of involuntary manslaughter, and further found that driver of death car was a person killed in the accident, and not the defendant, such a verdict is a general verdict, and is neither informal, or special. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

Verdict Against Joint Defendants.

Where two defendants are jointly charged and tried for grand larceny, verdicts brought in separately against each and entitled as if the defendant named in each verdict were the only defendant on trial, are not void for uncertainty, and are sufficient to authorize judgment and sentence. *State v. Cotterel*, 12 Idaho 572, 86 P. 527 (1906).

19-2306. Special verdict defined. — A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence, and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them. [Cr. Prac. 1864, § 406; R.S., R.C., & C.L., § 7920; C.S., § 8991; I.C.A., § 19-2206.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

Rendition Not Encouraged.

The practice of requiring a jury to answer special interrogatories, or to render a special verdict, in criminal cases is not to be encour-

aged, except in cases contemplated by § 19-2304. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

19-2307. Special verdict, how rendered. — The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged. [Cr. Prac. 1864, § 107; R.S., R.C., & C.L., § 7921; C.S., § 8992; I.C.A., § 19-2207.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

19-2308. Form of special verdict. — The special verdict need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury. [Cr. Prac. 1864, § 408; R.S., R.C., & C.L., § 7922; C.S., § 8993; I.C.A., § 19-2208.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

19-2309. Judgment on special verdict. — The court must give judgment upon the special verdict as follows:

1. If the plea is not guilty and the facts prove the defendant guilty of the offense charged in the indictment, or of any other offense of which he could be convicted under that indictment, judgment must be given accordingly. But if otherwise, judgment of acquittal must be given.

2. If the plea is a former conviction or acquittal of the same offense, the court must give judgment of acquittal or conviction, as the facts prove or fail to prove the former conviction or acquittal. [Cr. Prac. 1864, § 409; R.S., R.C., & C.L., § 7923; C.S., § 8994; I.C.A., § 19-2209.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

Recommendation for Leniency.

Jury's recommendation for leniency, though entitled to great consideration, has no binding effect on the court. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

19-2310. Defective special verdict — New trial. — If the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence, as established to their satisfaction, the court must order a new trial. [Cr. Prac. 1864, § 410; R.S., R.C., & C.L., § 7924; C.S., § 8995; I.C.A., § 19-2210.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

19-2311. Jury to find degree of crime. — Whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty. [1875, p. 363, § 409; R.S., R.C., & C.L., § 7925; C.S., § 8996; I.C.A., § 19-2211.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *In re McLeod*, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913); *State v. Gee*, 48 Idaho 688, 284 P. 845 (1930); *State v. Hix*, 58 Idaho 730, 78 P.2d 1003 (1938); *State v. Chauncey*, 97 Idaho 756, 554 P.2d 934 (1976).

ANALYSIS

Court's discretion.

Lesser offense.

Question for jury.

Reduction of degree on appeal.

Court's Discretion.

In a prosecution for poisoning animals, sentencing one defendant to the penitentiary for felony and the other to the county jail for misdemeanor was not an abuse of court's discretion. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

Lesser Offense.

Under this and the following sections court must leave to jury, in prosecution for murder, duty of determining the degree and grade of the offense; whether murder in the first or second degree, or manslaughter; the court cannot rule as a matter of law, that a certain kind of killing, such as by poison, is murder in the first degree, and instruct the jury that they must find the defendant guilty of that grade of offense or acquit him. The fact that the jury finds the defendant guilty of a lower grade of offense than that established by the evidence, is not ground for a reversal of the

conviction. *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907).

Burglary of the second degree is necessarily included in a charge of burglary of the first degree. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Question for Jury.

The finding of the degree of murder being by statute required to be found by the jury, it is not essential that the definitions of the various degrees should be stated in the indictment or information. *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1895).

A defendant was not entitled to discharge on habeas corpus hearing where he did not deny that the evidence at the preliminary hearing at which he was bound over to the district court on a charge of first-degree murder was sufficient to establish that he shot the victim but only contended that it was insufficient to establish premeditation, as the jury on trial of the cause would have the duty of determining the degree of homicide of which he was guilty. *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967).

Reduction of Degree on Appeal.

Where the jury found the defendant guilty of first degree burglary, but the state had failed to prove whether the crime was committed in the daytime or nighttime, the Supreme Court, on appeal, may reduce the offense to second degree burglary and remand the case with instructions to vacate the original judgment and enter a judgment of conviction of the lesser offense. *State v. Haggard*, 89 Idaho 217, 404 P.2d 580 (1965).

Collateral References. Failure of verdict on conviction of larceny or embezzlement to state value of property. 79 A.L.R. 1180.

19-2312. Conviction of included offense. — The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense. [Cr. Prac. 1864, § 411; R.S., R.C., & C.L., § 7926; C.S., § 8997; I.C.A., § 19-2212.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Inclusion of attempt when crime is consummated, § 18-305.

Cited in: *State v. Phinney*, 13 Idaho 307, 89 P. 634, 12 L.R.A. (n.s.) 935, 12 Ann. Cas. 1079 (1907); *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922); *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923); *State v. Nadlman*, 63 Idaho 153, 118 P.2d 58 (1941); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973).

ANALYSIS

Application to particular cases.

Attempt.

Double jeopardy.

In general.

Instructions.

Right to notice of charge.

Sentencing.

Application to Particular Cases.

Under indictment charging murder in the first degree, verdict of guilty of manslaughter is proper and is in accordance with the provisions of this section. In *re Alcorn*, 7 Idaho 101, 60 P. 561 (1900); *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901).

The crime of assault with a deadly weapon or instrument is not necessarily included in the statutory definition of murder, and unless the information charging murder also alleges an assault, defendant can not be convicted of an assault. In *re McLeod*, 23 Idaho 257, 128 P. 1106 (1913); *State v. Singh*, 34 Idaho 742, 203 P. 1064 (1921).

Where defendant is charged with completed offense of rape, it is competent for jury to find him guilty of that specific offense or of assault with intent to commit rape. *State v. Garner*, 45 Idaho 768, 265 P. 668 (1928).

Under charge of rape without use of force, on female under age of eighteen, defendant may be convicted of assault with intent to commit rape. *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Where information for burglary fails to allege entry at night it authorizes a conviction for second degree burglary only. *State v. Vanek*, 59 Idaho 514, 84 P.2d 567 (1938).

Driving an automobile while under influence of intoxicating liquor and reckless driving are not necessarily included offenses in involuntary manslaughter charge. *State v. Weise*, 75 Idaho 404, 273 P.2d 97 (1954).

Where the information charges the crime of negligent homicide committed by means of reckless driving and driving while under the influence of intoxicating liquor, those offenses

are necessarily included in the charge of negligent homicide. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960).

Burglary of the second degree is necessarily included in a charge of burglary of the first degree. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

The language of the charging part of the information, of "assault with intent to commit murder" as considered in this case, is sufficient to charge "assault with a deadly weapon," an included offense pursuant to this section; it clearly appears that the intent of appellant to do what the jury found he did was sufficiently established by the commission of the acts and circumstances surrounding them. *State v. Missenberger*, 86 Idaho 321, 386 P.2d 559 (1963).

Where the information charged an aggravated battery, was committed by defendant with premeditated design and by means calculated and likely to inflict great bodily injury, the information was sufficient to charge an aggravated assault as well as aggravated battery; and assault having been alleged as the manner and means of the commission of the aggravated battery, it was an included offense and the information therefore was not duplicitous. *State v. Blacksten*, 86 Idaho 401, 387 P.2d 467 (1963).

Penalty for assault with intent to commit rape is imprisonment of one to fourteen years, and for attempt to commit rape is one half of the punishment for the crime of rape which is imprisonment from one year to life; therefore, although one half of a life sentence cannot be calculated, the actual sentence thus fixed may be less than that imposed for assault with intent to commit rape, and greater punishment is not authorized for included offense. *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

The offense of "attempt to commit rape" can be included in the charge of "assault with intent to commit rape." *State v. Hall*, 88 Idaho 117, 397 P.2d 261 (1964).

Upon an information charging facts constituting both assault with intent to commit murder and the included offense of assault with a deadly weapon and entitled "Assault With a Deadly Weapon With Intent to Murder," it was competent for the jury to find him guilty of assault with intent to commit murder. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Driving with an invalid license is a lesser-included offense of driving without privileges under both the statutory and the pleading theories; therefore, where defendant's license was suspended for failing to take care of a citation, a conviction for driving with an invalid license was appropriate where the original charge was driving without privileges.

State v. Matalamaki, — Idaho —, 79 P.3d 162 (Ct. App. 2003).

Attempt.

One charged with the crime of "acting as a broker" may be convicted of an attempt to commit the crime. State v. Johnson, 54 Idaho 431, 32 P.2d 1023 (1934).

Double Jeopardy.

Where there was only one event, defendant's shooting at victim's door, on which charges could be based, the charge of assault with a deadly weapon was a lesser included offense in a charge of attempted robbery such as to preclude conviction of both charges under the double jeopardy clause of the fifth amendment of the United States Constitution and the Idaho Constitution. State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980).

In General.

Where the offense is charged in the language of the statute only, the defendant can be convicted only of the offense so charged, or of one of the degrees thereof, but if a lesser offense be charged, specifically, as a part of the higher, defendant may be convicted of the lesser. Defendant may be convicted of an included offense only where the allegations are sufficient to charge the lower. State v. Wilding, 57 Idaho 149, 63 P.2d 659 (1936).

Where defendant is found guilty of the crime of illegal sale of liquor, it only remained for the court to determine the question of law as to whether defendant was guilty of a felony as charged in the information, or of the included misdemeanor. State v. Garde, 70 Idaho 86, 212 P.2d 655 (1949).

An offense is an included offense if it is alleged in the information as a means or element of the commission of a higher offense. State v. Anderson, 82 Idaho 293, 352 P.2d 972 (1960).

Where amended information charged "assault with intent to commit rape," although the attempt was not by means of threat or violence, the means by which the alleged offense was committed also constituted an offense and was sufficiently set forth in the information as an included offense. State v. Hall, 88 Idaho 117, 397 P.2d 261 (1964).

The commitment of defendant for trial on a higher degree of offense than that the evidence showed him to have committed was not invalid, as the jury on trial of the cause could find him guilty of a lesser included offense. Carey v. State, 91 Idaho 706, 429 P.2d 836 (1967).

If in committing an offense one necessarily commits a second offense, that second offense will be deemed a lesser included offense. State v. McCormick, 100 Idaho 111, 594 P.2d 149 (1979).

The test for determining whether one of

fense is a lesser included of another is the same regardless of whether the determination is being made to decide if a requested instruction is proper or whether the determination is being made for the purposes of deciding if a defendant can be convicted of both offenses or only one under the double jeopardy clause. State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980).

I.C.R. Rule 31(c), § 19-2132(b) and this section impute no meaning to the word "lesser" different from the word "included" and, accordingly, the doctrine of the lesser included offense is not limited to an offense less serious than the crime charged. State v. Gilman, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Instructions.

In prosecution for involuntary manslaughter for causing death with automobile, refusal of instruction permitting conviction of the included offense of assault or battery was not prejudicial. State v. Brooks, 49 Idaho 404, 288 P. 894 (1930).

It was not error for the court to refuse to charge the jury, in rape prosecution, that defendant could be found guilty of a lesser offense, since there was no evidence that would reduce the crime charged to a lesser offense. State v. Elsen, 68 Idaho 50, 187 P.2d 976 (1947).

In involuntary manslaughter proceeding where jury at its own request was brought into presence of court and parties, and asked the court if it was required to recommend punishment of defendant, and court said no since that was the duty of the court, it was not error for court to fail to instruct jury on matter of included offenses. State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951).

Any offense, the commission of which is necessarily included in that charged in indictment or information, is an included offense; therefore, it is proper for an accused to request, and for the trial court to give, an instruction permitting a conviction of such an included offense, if there is sufficient evidence to support a conviction of the included offense. State v. Anderson, 82 Idaho 293, 352 P.2d 972 (1960).

It is the defendant's burden to request the court to instruct the jury on lesser included offenses if the prosecution has not asked that the defendant be convicted on the lesser charges. State v. Morris, 97 Idaho 420, 546 P.2d 375 (1976).

Court erred in refusing to instruct jury on lesser included offense of false personation in a trial on charge of illegal usage of credit card since courts cannot look merely at the crime charged in the information to determine whether an offense is included within the one charged, but must also look at the evidence adduced at trial. State v. Boyenger, 95 Idaho

396, 509 P.2d 1317 (1973), overruled in part, *State v. Curtis*, 130 Idaho 522, 944 P.2d 119 (1997).

Right to Notice of Charge.

Fairness requires that a criminal defendant be tried only upon charges of which he has notice and, accordingly, the general rule has evolved that an accused person is denied due process by variance between the crime charged in a prosecutor's information and the crime upon which a judgment of conviction is entered. However, there is a well-recognized exception to this general rule in that a defendant is deemed to have presumptive notice of a lesser included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

If an offense is "included" in the crime charged, a defendant may be fairly said to have constructive notice of the alleged conduct comprising it and such notice is not defeated by the fact that the included offense may carry a heavy penalty; accordingly, infor-

mation charging statutory rape of a 12-year-old girl furnished constructive notice to defendant that he might be convicted of lewd conduct as an included offense. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

Sentencing.

Since penalty for attempted robbery is half of sentence for robbery, which is imprisonment for five years to life, while punishment for assault with a deadly weapon is not more than five years, assault could not be considered the greater offense on the grounds that it carried greater penalty; although half of life sentence cannot be calculated, court can set base maximum sentence at less than life and use such maximum to determine the sentence for attempt so that actual sentence fixed for attempted robbery may be less than sentence for assault with deadly weapon. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

19-2313. Verdict against joint defendants. — On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment must be entered accordingly, and the case as to the others may be tried by another jury. [Cr. Prac. 1864, § 412; R.S., R.C., & C.L., § 7927; C.S., § 8998; I.C.A., § 19-2213.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Separate Convictions.

Under joint indictment, each defendant may be found guilty of a separate offense. *State v. Allen*, 38 Idaho 168, 219 P. 1050 (1923).

Where defendants were both charged with

murder, the jury could have reasonably concluded from the evidence that they agreed to commit a lawful act, in an unlawful manner, or without due caution and circumspection that such act caused the unlawful killing, and the jury might have further found that one defendant went beyond the agreement when he shot the victim in the back of the head, thereby raising his culpability to second degree murder while the other defendant was convicted of involuntary manslaughter. *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

19-2314. Reconsideration of verdict. — When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the court can not require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it can not be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the court. [Cr. Prac. 1864, §§ 413, 414; R.S., R.C., & C.L., § 7928; C.S., § 8999; I.C.A., § 19-2214.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

19-2315. Judgment on informal verdict. — If the jury persist in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment is given against him on a special verdict. [Cr. Prac. 1864, § 415; R.S., R.C., & C.L., § 7929; C.S., § 9000; I.C.A., § 19-2215.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

ANALYSIS

In general.
Special verdicts.

In General.

Verdict finding defendant "guilty as charged in the complaint" is good. *State v. Schweitzer*, 18 Idaho 609, 111 P. 130 (1910).

Special Verdicts.

The practice of requiring a jury to answer special interrogatories, or to render a special verdict, in criminal cases is not to be encouraged, except in cases contemplated by § 19-2304. *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958).

19-2316. Polling the jury. — When a verdict is rendered and before it is recorded, the jury may be polled at the request of either party, in which case they must be severally asked whether it is their verdict; and if each juror answer in the affirmative, then the verdict shall be recorded; but if a less number answer in the affirmative, the jury must be sent out for further deliberation. [Cr. Prac. 1864, § 416; R.S., § 7930; am. 1890-1891, p. 165, § 2; reen. 1899, p. 110, § 2; reen. R.C. & C.L., § 7930; C.S., § 9001; I.C.A., § 19-2216; am. 1967, ch. 44, § 1, p. 85.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S. L. 1976, ch. 44 declared an emergency. Approved Feb. 25, 1967.

Cross ref. Authority for five-sixths verdict, Const., Art. 1, § 7.

Manner of Polling.

Where jury was polled in manslaughter proceeding and severally affirmed the verdict as his or hers it was not error for trial court to refuse to poll jury in regard to specific element or elements on which the verdict was based. *State v. Bounds*, 74 Idaho 136, 258 P.2d 751 (1953).

19-2317. Recording verdict. — When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is

complete, and the jury must be discharged from the case. [Cr. Prac. 1864, § 417; R.S., R.C., & C.L., § 7931; C.S., § 9002; I.C.A., § 19-2217.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Upham, 52 Idaho 340, 14 P.2d 1101 (1932).

19-2318. Discharge or detention of defendant on acquittal. — If judgment of acquittal is given on a general verdict and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given, except where the acquittal is because of a variance between the proof and the indictment, which may be obviated by a new indictment, the court may order his detention to the end that a new indictment may be preferred, in the same manner and with like effect as provided in case where the indictment does not state a public offense. [Cr. Prac. 1864, § 418; R.S., R.C., & C.L., § 7932; C.S., § 9003; I.C.A., § 19-2218.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Proceedings on discharge of jury for insufficient indictment. § 19-2122.

19-2319. Committal of defendant on conviction. — If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody, or if on bail he may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed, his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant. [Cr. Prac. 1864, § 419; R.S., R.C., & C.L., § 7933; C.S., § 9004; I.C.A., § 19-2219.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Chauncey, 97 Idaho 756, 554 P.2d 934 (1976).

19-2320. Acquittal for insanity. [Repealed.]

Compiler's notes. This section, which comprised R.S., R.C., & C.L., § 7934; C.S., § 9005; I.C.A., § 19-2220, was repealed by

S.L. 1970, ch. 31, § 15. For present law see § 18-207.

CHAPTER 24

EXCEPTIONS — NEW TRIAL — ARREST OF JUDGMENT

SECTION.

19-2401. [Superseded.]

19-2402. Transcript and exhibits on appeal to Supreme Court.

19-2403. Rulings deemed excepted to.

SECTION.

19-2404. New trial defined.

19-2405. Effect of new trial.

19-2406. Grounds for new trial.

19-2407. Time for application.

SECTION.

19-2408. Arrest of judgment — Grounds for motion.

19-2409. Arrest without motion.

SECTION.

19-2410. Effect of sustaining motion.

19-2411. Discharge or detention of defendant.

19-2401. Judicial acts excepted to — Bill of exceptions not necessary. [Superseded.]

Compiler's notes. This section, comprising 1927, ch. 24, § 1, p. 28; I.C.A., § 19-2301, as amended by order of Supreme Court effective September 19, 1951, is deemed superseded by Rule 51 of the Rules of Criminal Practice and Procedure.

The superseded section read:

"Any ruling, instruction, order, decision,

judgment, and all judicial acts of the court or judge thereof, in a criminal action occurring before or after judgment shall be deemed excepted to. The same need not be embodied in a bill of exceptions but, when appearing in the records, files, minutes or transcript of the action may be reviewed upon appeal."

19-2402. Transcript and exhibits on appeal to Supreme Court. —

Any party desiring to procure a record of the evidence, proceedings and exhibits made during the trial of a criminal action in the district court for use on appeal to the Supreme Court may procure such transcript and exhibits in the same way in which a transcript and exhibits are obtained in a civil action. Said transcript shall be ordered, prepared, served, settled, lodged, filed and used in the same way and with the same effect as in a civil action. The provisions of section 10-509 shall apply to a reporter's transcript in a criminal action. [1927, ch. 135, § 1, p. 178; I.C.A., § 19-2302; am. 1949, ch. 179, § 1, p. 381.]

Compiler's notes. Section 10-509 referred to in this section has been repealed.

This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S. L. 1949, ch. 179, provided that said act should be in full force and effect on and after July 1, 1949.

Cited in: Crossler v. Safeway Stores, 51 Idaho 413, 6 P.2d 151 (1931); State v. Upham, 52 Idaho 340, 14 P.2d 1101 (1932).

ANALYSIS

Death of reporter.

Insufficiency of evidence.

Waiver.

Death of Reporter.

Where appellant was convicted and thereafter took the usual proceedings for an appeal, but reporter died before transcript was prepared and it being shown that a transcript of the testimony could not be obtained, the judgment of conviction will be affirmed, since Supreme Court has no power to grant a new trial, either in the exercise of its original or appellate jurisdiction. State v. Ricks, 32 Idaho 232, 180 P. 257, 13 A.L.R. 99 (1919).

Insufficiency of Evidence.

Specification of insufficiency of the evidence must point out in what particular the evidence is insufficient. State v. Thomey, 61 Idaho 60, 97 P.2d 659 (1939).

Waiver.

Where a party had ten days after receipt of the transcript to claim errors and omissions thereto and no designation of error was made and served within such time upon the district court and all adverse parties, the right to assign error thereto was lost. State v. Wozniak, 94 Idaho 312, 486 P.2d 1025 (1971), overruled on other grounds, State v. Tucker, 97 Idaho 4, 539 P.2d 556 (1975).

Collateral References. 58 Am. Jur. 2d, New Trial, § 1 et seq.

66 C.J.S., New Trial, § 1 et seq.

Propriety and effect of court's indication to jury that court would suspend the sentence. 8 A.L.R.2d 1001.

Voluntary statements damaging to accused, not proper subject of testimony, uttered by a testifying police or peace officer, as ground for granting new trial. 8 A.L.R.2d 1013.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion. 23 A.L.R.2d 852.

Prejudicial effect of admission of evidence as to Communist or other subversive affilia-

tion or association of accused. 30 A.L.R.2d 589.

Permitting jurors to attend theatre or the like during course of criminal trial as ground for mistrial, new trial, or reversal. 33 A.L.R.2d 847.

Communication or contact between court officials or attendants and jurors in criminal case. 41 A.L.R.2d 227; 38 A.L.R.3d 1012; 35 A.L.R.4th 890; 43 A.L.R.4th 410.

New trial on ground of reading or refusing to read reporter's notes to jury. 50 A.L.R.2d 176.

Right of indigent defendant in criminal case to aid of state as regards new trial. 55 A.L.R.2d 1072.

Conviction of lesser offense as bar to prosecution for greater or new trial. 61 A.L.R.2d 1141.

Absence of convicted defendant during hearing or argument of motion for new trial or an arrest of judgment. 69 A.L.R.2d 835.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct. 76 A.L.R.2d 920.

Criminal trial of one under influence of drugs or intoxicants at time of trial, as grounds for new trial. 83 A.L.R.2d 1067.

Coaching of witness by spectator at trial as prejudicial error requiring new trial. 83 A.L.R.2d 1128, 1142.

Propriety and effect as double jeopardy, of court's grant of new trial on own motion in criminal case. 85 A.L.R.2d 486.

Propriety and prejudicial effect of showing, in criminal case, withdrawing guilty plea. 86 A.L.R.2d 326.

Use of alias of accused in instructions to jury in criminal case as derogatory to reputation and improper. 87 A.L.R.2d 1217.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial. 88 A.L.R.2d 1275.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict. 97 A.L.R.2d 788.

Criminal case, appealability of order arresting judgment in. 98 A.L.R.2d 737.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities. 5 A.L.R.3d 466, 574.

Prejudicial effect, in criminal case, of communications between witnesses and jurors. 9 A.L.R.3d 1275.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 A.L.R.3d 832.

Propriety of increased punishment on new trial for same offense. 12 A.L.R.3d 978.

Propriety under *Griffin v. California* and prejudicial effect of unrequested instructions that no inferences against accused shall be drawn from his failure to testify. 18 A.L.R.3d 1335.

Prejudicial effect of holding accused in contempt of court in presence of jury. 29 A.L.R.3d 1399.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony. 34 A.L.R.3d 775.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused. 34 A.L.R.3d 1313.

Perjury or willfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence. 38 A.L.R.3d 812.

Propriety and prejudicial effect in criminal case, of placing jury in charge of officer who is a witness in the case. 38 A.L.R.3d 1012.

Gestures or facial expressions of trial judge in criminal case, indicating approval or disapproval, belief or disbelief, is ground for relief. 49 A.L.R.3d 1186.

Recantation by prosecuting witness in sex crime as ground for new trial. 51 A.L.R.3d 907.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 A.L.R.3d 176.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time. 69 A.L.R.3d 933.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 A.L.R.3d 769.

Prosecution or conviction of one conspirator as affected by disposition of case against co-conspirators. 19 A.L.R.4th 192.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self incrimination privilege, one involved in offense charged against accused. 19 A.L.R.4th 368.

Emotional manifestations by victim or family of victim during criminal trial as grounds for reversal, new trial, or mistrial. 31 A.L.R.4th 229.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 A.L.R.4th 1170.

Juror's reading of newspaper account of trial in criminal case during its progress as ground for mistrial, new trial, or reversal. 46 A.L.R.4th 11.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 A.L.R.4th 1049.

19-2403. Rulings deemed excepted to. — The ruling and decision of the court in criminal cases disallowing a challenge to the panel of the jury,

or to any individual juror, for any of the causes set forth in sections 19-2018, 19-2019 shall be deemed excepted to on the part of the defendant. [1905, p. 328, § 1; reen. R.C. & C.L., § 7947; C.S., § 9014; I.C.A., § 19-2304.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2404. New trial defined. — A new trial is a reexamination of the issue in the same court, before another jury, after a verdict has been given. [Cr. Prac. 1864, § 426; R.S., R.C., & C.L., § 7950; C.S., § 9015; I.C.A., § 19-2305.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. New trial, I.C.R. 34.

19-2405. Effect of new trial. — The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to either in evidence or in argument. [Cr. Prac. 1864, § 426; R.S., R.C., & C.L., § 7951; C.S., § 9016; I.C.A., § 19-2306.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2406. Grounds for new trial. — When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

1. When the trial has been had in his absence, if the indictment is for a felony.

2. When the jury has received any evidence out of court other than that resulting from a view of the premises.

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits

the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable. [1875, p. 363, § 424; R.S., R.C., & C.L., § 7952; C.S., § 9017; I.C.A., § 19-2307.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931); *State v. Wilson*, 51 Idaho 659, 9 P.2d 497 (1932); *State v. Cacavas*, 55 Idaho 538, 44 P.2d 1110 (1935); *State v. Thomas*, 94 Idaho 430, 489 P.2d 1310 (1971); *State v. Elisondo*, 97 Idaho 425, 546 P.2d 380 (1976); *State v. Barlow*, 113 Idaho 573, 746 P.2d 1032 (Ct. App. 1987); *State v. Palmer*, 114 Idaho 895, 761 P.2d 1247 (Ct. App. 1988); *State v. Brazzell*, 118 Idaho 431, 797 P.2d 139 (Ct. App. 1990); *State v. Thomas*, 126 Idaho 299, 882 P.2d 466 (Ct. App. 1994), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (1995); *State v. Davis*, 127 Idaho 62, 896 P.2d 970 (1995); *Lankford v. State*, 127 Idaho 100, 897 P.2d 991 (1995); *State v. Nelson*, 131 Idaho 210, 953 P.2d 650 (Ct. App. 1998); *State v. Arrasmith*, 132 Idaho 33, 966 P.2d 33 (Ct. App. 1998); *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001); *State v. Howell*, 137 Idaho 817, 54 P.3d 460 (Ct. App. 2002); *State v. Olson*, 138 Idaho 438, 64 P.3d 967 (Ct. App. 2003).

ANALYSIS

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Construction with Criminal Rules.

I.C.R. 34, governing new trials in criminal cases, invokes the trial court's discretion and plainly is broad enough to embrace all of the

statutory grounds contained in this section. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

This section sets forth the only grounds permitting the grant of a new trial and the limits of instances in which the trial court's discretion may be exercised. Although I.C.R., Rule 34 allows a trial court to grant a new trial if required in the interest of justice, it does not provide an independent ground for a new trial. Rather, I.C.R., Rule 34 simply states the standard that the trial court must apply when it considers the statutory grounds. *State v. Cantu*, 129 Idaho 673, 931 P.2d 1191 (1997).

Neither this section nor I.C.R. 34 prohibit the grant of a new trial on grounds not argued by the defendant, as long as the defendant has requested a new trial and the ground relied upon by the court is one of those specified in the statute. *State v. Mack*, 132 Idaho 480, 974 P.2d 1109 (Ct. App. 1999).

Contrary to Evidence.

Where information charges property of C. W. Dunham was stolen, proof shows that Chas. Dunham was owner, and verdict shows that property was that of C. W. Dunham, variance was not sufficient to warrant new trial, where it does not appear that they were different persons. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Discretion of Court.

Grounds for new trial in a criminal case are prescribed by this section and court can not provide any other ground by rule. *State v. Davis*, 6 Idaho 159, 53 P. 678 (1898).

Order granting defendant a new trial in criminal case will be sustained where it appears that the evidence was conflicting, though order does not state on what grounds it was based, when no error is manifest from record. *State v. Driskell*, 12 Idaho 245, 85 P. 499 (1906).

Where motion for new trial in a criminal case is granted, action of court will be sustained on appeal unless it appears that there was clear abuse of discretion in granting such new trial. *State v. Barber*, 15 Idaho 96, 96 P. 116 (1908).

Where a new trial is granted, court should specify the grounds therefor. *State v. Barber*, 15 Idaho 96, 96 P. 116 (1908).

The granting or a refusal of a new trial is in the sound discretion of the trial court who has all of the facts and circumstances before it and has seen and heard the witnesses, and will not be disturbed except where it is shown

there is an abuse of this discretion. *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *State v. Askew*, 32 Idaho 456, 184 P. 473 (1919); *State v. Black*, 36 Idaho 27, 208 P. 851 (1922); *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924); *State v. Morrison*, 52 Idaho 99, 11 P.2d 619 (1932); *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932).

The granting or refusal of a new trial is in the sound discretion of the trial judge who has all of the facts and circumstances before him and has seen and heard the witnesses; and only where it is shown that the judge has abused this discretion will he be overruled. *State v. McConville*, 82 Idaho 47, 349 P.2d 114 (1960).

The granting of a new trial is largely in the discretion of the court. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

Where affidavits in support of motion for new trial were relevant only to a collateral issue, the credibility of the state's witness, and were largely cumulative of evidence which was presented at trial, the trial court's denial of defendant's motion for a new trial was not an abuse of its discretion and was not error. *State v. Powers*, 100 Idaho 290, 596 P.2d 802 (1979).

The question of whether the interest of justice requires a new trial under the circumstances of a particular case is directed to the sound discretion of the trial court, and the trial court's decision thereon will not be disturbed absent an abuse of that discretion. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

A trial judge does not abuse his or her discretion with regard to the granting of a new trial unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interest of justice. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

This section sets forth the only bases for the grant of a new trial. Ineffective assistance of counsel is not included in that list. Thus, while a decision of whether to grant a new trial is a discretionary matter for the trial judge, this section limits the instances in which that discretion may be exercised. *State v. Gomez*, 126 Idaho 83, 878 P.2d 782 (1994), cert. denied, 513 U.S. 1005, 115 S. Ct. 522, 130 L. Ed. 2d 427 (1994).

A trial judge does not abuse his or her discretion unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interests of justice. *State v. Gomez*, 126 Idaho 83, 878 P.2d

782 (1994), cert. denied, 513 U.S. 1005, 115 S. Ct. 522, 130 L. Ed. 2d 427 (1994).

The decision whether to grant a new trial rests in the sound discretion of the trial court; therefore, the appellate court will not reverse the trial court's decision on such a motion absent a showing of abuse of discretion. *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

In prosecution for rape where defendant's motion in limine to exclude testimony concerning incident that happened after defendant's attack on the victim, was filed before trial, was discussed at pretrial conference, but a decision was deferred because defendant was not personally present and the court instructed the parties to refrain from discussing the incident in either the jury voir dire or opening statement until such time as ruling was made and in subsequent pretrial conference the court was not asked to render a decision on the motion and no ruling was made until the challenged evidence was offered during the trial. The relevance of the testimony regarding the incident did not become apparent until the defendant's defense strategy was revealed. There was no prejudice to the defendant merely because defense counsel was unable to discuss this evidence with the jury during voir dire or opening statement and thus, the court's denial of the defendant's motions for a mistrial and for a new trial insofar as they were based upon the claim that there was prejudicial error in the timing of the court's decision on the motion in limine, was proper. *State v. Dopp*, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996).

Disqualification of Juror.

To entitle a person to a new trial on ground of disqualification of juror, the showing should be clear and conclusive, and trial court should be clearly satisfied that defendant has been denied the impartial trial guaranteed to him by the Constitution. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910).

Effect of Nondisclosure.

Defense counsel was aware of the evidence and had the opportunity to raise any objection to its nondisclosure to the district court, and because he failed to do so the record on appeal did not establish whether the evidence was disclosed or, if it was not, how the nondisclosure may have affected the results of the proceedings below, and the failure to raise the issue below precluded its consideration on appeal. *State v. Osborne*, 130 Idaho 365, 941 P.2d 337 (Ct. App. 1997).

Excusing Unchallenged Juror.

Error in excusing juror unchallenged by state is not one of the grounds for which a new trial may be granted. *State v. McGraw*, 6 Idaho 635, 59 P. 178 (1899).

Harmless Error.

Although trial court was incorrect in ruling which would have permitted disclosure of defendant's out-of-state incarceration if he introduced alibi evidence to refute testimony of prior uncharged molestations, in light of the limitations of the unrepresented alibi testimony, such evidence would not have likely produced an acquittal; denial of defendant's motion for a new trial affirmed. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

Hearing on Motion.

Affidavits of jurors are not admissible to impeach their verdict after same has been rendered. *State v. Rigley*, 7 Idaho 292, 62 P. 679 (1900).

Where on motion for new trial in a criminal case defendant files affidavit that a certain juror, previous to trial, had stated with reference to defendant that he ought to be hung, there is such an attack on the veracity of juror (who had stated on his voir dire that he had expressed no opinion as to the guilt of defendant) as to authorize reception of sustaining affidavits on behalf of state, to the effect that juror's reputation for truth and veracity was good. *State v. Levy*, 9 Idaho 483, 75 P. 227 (1904).

Right of state to file counter-affidavits to an application for a new trial has been frequently recognized. *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

If defendant seeks to impeach verdict by showing misconduct in jury room, he should be able to present sworn statement upon which court might proceed. *State v. Abbott*, 38 Idaho 61, 213 P. 1024, 224 P. 791 (1923).

Juror will not be allowed to impeach his verdict except for reason that it was arrived at as result of chance. *State v. Boykin*, 40 Idaho 536, 234 P. 157 (1925), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

In a situation where a defendant requests a new trial because of recanted testimony, the trial court must be satisfied that the original testimony was false and that the new testimony is true if the judge is to grant a new trial; accordingly, it is vital that the trial judge be allowed to ask questions for clarification and for the gathering of information during a hearing on such a motion for new trial, and the court did not err in interrogating the recanting witness during the hearing, or in striking his testimony upon failing to get a desired response. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied,

497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Ineffective Assistance of Counsel.

A claim for ineffective assistance of counsel is not one of the enumerated grounds and does not state a basis for a new trial under this section; such a claim is more appropriately considered through an application for post-conviction relief. *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

Since a new trial may not be ordered for a reason other than those specified in this section, an allegation of ineffective assistance of counsel does not state a basis for a new trial; such claims may appropriately be presented through an application for post-conviction relief. Denial of motion based on this claim was not an abuse of discretion. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

Ineffective assistance of counsel is not among the grounds for a new trial delineated in this section. The appropriate means to present an ineffective assistance claim is an application for post-conviction relief. Therefore, state's argument that the ineffective assistance of counsel claim could have been raised on direct appeal was erroneous. *Milburn v. State*, 130 Idaho 649, 946 P.2d 71 (Ct. App. 1997).

—Limitations.

While the decision of whether to grant a new trial is a discretionary matter for the trial judge, this section limits the instances in which that discretion may be exercised. *State v. Jones*, 127 Idaho 478, 903 P.2d 67 (1995).

Insufficient Grounds.

The grounds set out in motion that the defense counsel did not have sufficient time to prepare defense and that the defendant was held improperly and thus unable to aid the defense counsel in preparation of his defense did not constitute proper grounds for a new trial under the statute. *State v. Laws*, 94 Idaho 200, 485 P.2d 144 (1971).

There was no authority for the proposition that a defendant is entitled to a new trial in order to place a co-defendant, who has not previously testified, before a new jury in defendant's retrial. *State v. Rodgers*, 119 Idaho 1066, 812 P.2d 1227 (Ct. App. 1990), aff'd, 119 Idaho 1047, 812 P.2d 1208 (1991).

Misconduct of Juror.

Fact that jury is furnished with liquor under the direction of court during the trial, and again after they had agreed upon their verdict, is not ground for a new trial, where there

is no claim of over-indulgence on the part of any member of jury. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894); *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1920).

New trial will not be granted for alleged misconduct of jury established merely by ex parte affidavits to the effect that certain jurors, prior to the trial, had made statements that defendant was guilty, where such jurors are shown by counter-affidavits to be men of good standing and deny the making of the statement. *State v. Davis*, 6 Idaho 159, 53 P. 678 (1898).

It is error to permit juror to use intoxicating liquors during the trial of a case or during the deliberations of jury unless it is done by permission of court upon the prescription of a practicing physician. *Bernier v. Anderson*, 8 Idaho 675, 70 P. 1027 (1902).

It is error to deliver a sealed letter to juror in a criminal case after the cause has been finally submitted to jury, but to entitle juror to the delivery of the letter it should first be submitted to court and examined by judge and delivered to counsel for inspection. *State v. Bland*, 9 Idaho 796, 76 P. 780 (1904).

Giving of a letter to juror before verdict will not be deemed ground for reversal when letter was as to trivial personal matters and was not known by judge to have been delivered to juror, and is not assigned as ground for a new trial. *State v. Rooke*, 10 Idaho 388, 79 P. 82 (1904).

Allowing jurors to read newspapers not in evidence, containing statements relative to the case prejudicial to defendant, justifies a new trial. *State v. Tilden*, 27 Idaho 262, 147 P. 1056 (1915).

If, while viewing the scene of an assault with a deadly weapon, jurors make demonstrations with a broom to test feasibility of assault, consult each other on the subject, and exchange remarks with strangers, this is misconduct by jury, for which a new trial may be awarded. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

Where juror failed to acknowledge that he knew defense witness, but where the last contact between the two had been about six years prior and defendant could show no actual prejudice to his case, defendant was not entitled to challenge that juror for cause. *State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Ct. App. 1997).

Defendant failed to present credible evidence in support of his allegation of misconduct on the part of any juror and district court held that the hearsay statement by the juror "I know he is guilty because he looks guilty," was an expression of the juror's personal opinion and was not the equivalent of misconduct. *Campbell v. State*, 130 Idaho 546, 944 P.2d 143 (Ct. App. 1997).

Newly-Discovered Evidence.

New trial should never be granted on the ground of newly-discovered evidence when such evidence is merely cumulative, nor when it was easily within the reach of defendant, and with reasonable diligence could have been produced at trial. *State v. Davis*, 6 Idaho 159, 53 P. 678 (1898); *State v. Fleming*, 17 Idaho 471, 106 P. 305 (1910), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *State v. Lumpkin*, 31 Idaho 175, 169 P. 939 (1917).

New trial will not be granted on ground of newly-discovered evidence unless it is shown that the introduction of such evidence might change the result of verdict, and sufficient reason must be shown why such evidence could not have been presented at former trial. *State v. Bond*, 12 Idaho 424, 86 P. 43 (1906).

Application for a new trial on ground of newly-discovered evidence will not be granted unless due diligence is shown, and it is probable that a different result may follow another trial. *State v. Williams*, 12 Idaho 483, 86 P. 53 (1906).

Where defendant in a criminal case assumes the risk of standing trial, notwithstanding absence of certain evidence which he deems material and of which he then knows, and makes no application for a continuance to enable him to procure such evidence, he can not procure a new trial on ground of newly-discovered evidence. *State v. Cook*, 13 Idaho 45, 88 P. 240 (1907).

Defendant was not entitled to new trial on ground of newly-discovered evidence where evidence was known at time of trial but was not used since defendant's counsel thought it was not material. *State v. Weise*, 75 Idaho 404, 273 P.2d 97 (1954).

A new trial will not be granted on grounds of newly-discovered evidence unless it is shown that the introduction of such evidence might change the results of the trial. *State v. McConville*, 82 Idaho 47, 349 P.2d 114 (1960).

Denial of motion for new trial was proper where alleged newly-discovered evidence went only to the credibility of the prosecutrix who in direct examination gave only one answer directly tending to incriminate the defendant, and testimony of eyewitness to the crime, with other evidence, was sufficient to support a verdict of guilty. *State v. McConville*, 82 Idaho 47, 349 P.2d 114 (1960).

Newly-discovered evidence, which is merely cumulative or designed to contradict witness, is not sufficient to warrant the granting of a new trial. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

Affidavit of a male individual acquainted with the rape victim's sister who said the sister told him that the victim had told the sister she had not been forcibly raped by defendant was not newly discovered evidence

warranting new trial since the information in the disputed affidavit was inadmissible as being compounded hearsay which could only be used, if at all, to impeach the rape victim insofar as her testimony indicated the use of force, and issue which was immaterial because consent was not a defense to statutory rape charge; moreover, it was unlikely that the information provided by affidavit could have produced an acquittal since the sister, who was the crucial link in the chain of hearsay, flatly denied making the statement attributed to her. *State v. Palin*, 106 Idaho 70, 675 P.2d 49 (Ct. App. 1983).

Where the codefendant who testified against the defendant sent a note to the defendant which stated, "Please forgive me Shawn I was worry [sic] by not telling the truth and about you as well," the note was subject to multiple inferences and did not constitute an affidavit; therefore, the record was not sufficiently developed to permit the Supreme Court to conclude that the trial court abused its discretion in denying the motion for a new trial. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Where the defendant submits an affidavit by a government witness in which the witness recants his testimony and specifies in what ways he dishonestly testified and would, if given the opportunity to testify again, change that testimony, and the defendant makes a showing that such changed testimony may be material to a finding of his guilt or innocence, a new trial should be held. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Although the content of an absent witness' testimony may be predicted, it is not "known" until that witness is contacted; therefore, if the witness cannot be contacted until after trial, the witness' testimony is newly discovered evidence. *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

Although the testimony of a witness whose whereabouts were discovered only after trial was arguably cumulative insofar as it would corroborate the defendant's own story, it was not merely cumulative, where it added substantially to the defendant's defense by presenting independent evidence of his whereabouts during the alleged time of the assault, and thus, this newly discovered evidence met the requirement of materiality. *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

A motion for a new trial based on newly discovered evidence must satisfy the test adopted in *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976): (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the

evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct. App. 1986).

The trial court did not abuse its discretion in denying a new trial on the ground that the newly discovered evidence would probably not have produced an acquittal in a new trial. *State v. Dambrell*, 120 Idaho 532, 817 P.2d 646 (1991).

Although ineffective assistance of counsel and prosecutorial misconduct are not grounds for a new trial under this section, a new trial may be granted based on newly discovered evidence if the moving party shows (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that the failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995).

Because the medical screening form would only have been cumulative of substantial other evidence, it was improbable that introduction of the form would have changed the outcome of the trial. Accordingly, the court properly rejected the defendant's claim that he was entitled to a new trial based upon newly discovered evidence. *State v. Dopp*, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996).

Court properly denied the defendant's motion for a new trial where the evidence was not newly discovered — its import was evident during trial, and before the prosecutor's closing argument. *State v. Curless*, 137 Idaho 138, 44 P.3d 1193 (Ct. App. 2002).

Newspaper Articles.

Newspaper articles concerning a trial both before and during the trial provided insufficient grounds for new trial without a showing that the jury has been influenced by such publicity or received evidence out of court. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Prosecutorial Misconduct.

Allegations of prosecutorial misconduct at trial are not among the grounds for a new trial provided by this section and the trial court did not abuse its discretion in denying defendant's motion on that basis. *State v. Jones*, 127 Idaho 478, 903 P.2d 67 (1995).

The district court did not abuse its discretion in denying defendant's motion for a new trial on the basis of prosecutorial misconduct, because allegations of prosecutorial misconduct at trial are not among the grounds for a new trial provided by this section. *State v.*

Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

Because allegations of prosecutorial misconduct at trial are not among the grounds for a new trial provided for in this section, the trial court did not abuse its discretion in denying defendant's motion on that basis. *State v. Page*, 135 Idaho 214, 16 P.3d 890 (2000).

Recanted Testimony.

Although this section does not specifically address new trials on the basis of recanted testimony as opposed to the discovery of new evidence, recanted testimony is a form of new evidence and is thus covered by subdivision (7) of this section. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Separation of Jury.

Fact that jurors attend the theater during the progress of a murder trial and sit six in one box and six in another is not such a separation or misconduct as to require a new trial in absence of any showing of prejudice. *State v. Levy*, 9 Idaho 483, 75 P. 227 (1904).

Separation of jury prior to the final submission of case to them is not a specific ground for new trial, and while a showing of such separation in homicide case establishes prima facie defendant's right to a new trial, yet effect of such showing may be overcome by state's establishing affirmatively that no prejudice resulted from the separation. *State v. Sly*, 11 Idaho 110, 80 P. 1125 (1905).

Act of juror in deliberately separating from his fellows after submission of the case, explained only by his own uncorroborated affidavit to the effect that he spoke to no one about case during such separation, is ground for new trial. *State v. West*, 11 Idaho 157, 81 P. 107 (1905).

In absence of evidence of misconduct, mere separation of jury during progress of trial is not ground for new trial. *State v. Chacon*, 36 Idaho 148, 209 P. 889 (1922), overruled on other grounds, *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

Where jury separated after cause is submitted to them in criminal action, prejudice will be presumed and new trial granted. *State v. Mahoras*, 42 Idaho 544, 246 P. 304 (1926).

Statutory.

Grounds for a new trial are those set forth in the statute. *State v. Weise*, 75 Idaho 404, 273 P.2d 97 (1954).

Substantial Evidence.

Pursuant to a jury trial or a nonjury trial, an appellate court will not set aside a judgment of conviction entered upon a verdict if there is substantial evidence upon which a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; on appeal after conviction, the evidence will be viewed most favorably to the prosecution. The record will be reviewed to determine if substantial evidence exists and the appellate court is precluded from substituting its judgment for that of the fact finder as to the credibility of the witnesses, the weight of the testimony, and the reasonable inferences to be drawn from the evidence, and the mere possibility of innocence will not invalidate a guilty verdict on appeal. *State v. Hickman*, 119 Idaho 366, 806 P.2d 959 (Ct. App. 1991).

When the sufficiency of the evidence is challenged in a jury verdict context, the Court of Appeals will not set aside the judgment of conviction if there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and where a finding of guilt is by the court, the same standard of review applies. *State v. Olson*, 119 Idaho 370, 806 P.2d 963 (Ct. App. 1991).

Toll of Appeals Period.

Even if motion for a new trial had not fallen within the parameters of this section, it would have extended the time for appeal from the judgment under the tolling provisions of I.A.R. 14. *State v. Lee*, 131 Idaho 600, 961 P.2d 1203 (Ct. App. 1998).

Unavailable Witness.

Where defendant claimed that he was at a bar at the time of the alleged incidents, and where a duly diligent search for corroboration of this claim would at least encompass the employees of the establishment where the person claims to have been; but neither defendant's motion for a new trial, nor any other portion of the record suggests any reason why the bartender's testimony was unavailable to defendant prior to trial, the denial of the motion for a new trial was proper. *State v. Morris*, 101 Idaho 120, 609 P.2d 652 (1980).

Waiver of Objection to Misconduct.

Defendant, with full knowledge of the misconduct of jury in wrongfully receiving evidence out of court, having chosen not to complain to court, but rather to take the risk of a verdict in his favor, could not afterward, because verdict was against him, have a new trial on this ground. *State v. Baker*, 28 Idaho 727, 156 P. 103 (1916).

Collateral References. See *Collateral References*, § 19-2402.

Perjury, statement or comment by counsel regarding, as ground for new trial. 127 A.L.R. 1415.

Appellate proceedings or motion for new trial, application for or acceptance of executive clemency as affecting. 138 A.L.R. 1162.

Communications or other improper acts of third persons, admissibility of testimony or affidavits of members of jury to show. 146 A.L.R. 514.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that judge believes defendant guilty. 90 A.L.R.3d 822.

Modern status of sudden emergency doctrine. 10 A.L.R.5th 680.

Prejudicial effect of statement by prosecu-

tor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities. 10 A.L.R.5th 700.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal — Individualized determinations. 104 A.L.R.5th 357.

19-2407. Time for application. — The application for a new trial may be made before or after judgment; and must be made within the time provided by the Idaho criminal rules unless the court or judge extends the time. [Cr. Prac. 1864, § 428; R.S., R.C., & C.L., § 7953; C.S., § 9018; I.C.A., § 19-2308; am. 1989, ch. 83, § 1, p. 145; am. 1993, ch. 87, § 1, p. 216.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957).

ANALYSIS

Application for extension of time.

Construction.

Sufficiency of application.

Application for Extension of Time.

The application for an extension of time within which to move for a new trial must be made within the ten-day period, since this requirement is jurisdictional. State v. Davis, 8 Idaho 115, 66 P. 932 (1901).

Construction.

Application for new trial must be made within ten days after verdict unless time for making the same has been extended by court or judge; if application is not so made, an appeal from the order denying new trial will be dismissed on motion. State v. Dupuis, 7 Idaho 614, 65 P. 65 (1901); State v. Rice, 7 Idaho 762, 66 P. 87 (1901); State v. Davis, 7 Idaho 776, 65 P. 429 (1901); State v. Davis, 8 Idaho 115, 66 P. 932 (1901); State v. Chacon, 36 Idaho 148, 209 P. 889 (1922), overruled on other grounds, State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992).

Upon pronouncement of judgment, more than ten days after the verdict was rendered and without any application having been theretofore made, the court stated "that the execution of this sentence and judgment be suspended for thirty days to enable counsel for defendant to ascertain whether or not they want to make a motion for a new trial."

Regardless of the intent of this statement, the right to move for a new trial was lost, the court being without jurisdiction in the matter after the lapse of the ten-day period as provided by statute. State v. Neil, 58 Idaho 359, 74 P.2d 586 (1937).

Where the jury arrived at a verdict on Nov. 8, judgment of conviction was entered on Nov. 10 and the motion for new trial was not mailed until Nov. 20 and not filed until Nov. 22, the trial court properly denied the motion for a new trial on the ground that it was not timely made. State v. Freeman, 85 Idaho 339, 379 P.2d 632 (1963).

Where defendant's motion for a new trial was filed 15 years after judgment was rendered in defendant's case, the motion was filed well beyond the required time limit and was, therefore, untimely. State v. Parrott, 138 Idaho 40, 57 P.3d 509 (Ct. App. 2002).

Sufficiency of Application.

Notice of intention to apply for new trial, served on district attorney and filed with clerk, is not an application for a new trial. State v. Smith, 5 Idaho 291, 48 P. 1060 (1897).

Notice of intention to move for new trial, where it embraced same grounds as motion subsequently filed out of time, and was treated by court and counsel as application for new trial, is sufficient as such, and appeal will not be dismissed on ground that former application was not filed within ten days. State v. Hunsaker, 37 Idaho 413, 216 P. 721 (1923).

Where defendant serves and files his notice of intention to move for new trial and states therein the grounds upon which the application is based, and trial court and respective counsel treat such notice as an application for a new trial, Supreme Court will so treat it, and will not dismiss appeal from order denying a new trial on ground that formal application for a new trial was not made. State v. Wright, 12 Idaho 212, 85 P. 493 (1963).

19-2408. Arrest of judgment — Grounds for motion. — A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant on a plea of a former conviction or acquittal. It may be founded on any of the defects in the indictment that are grounds of demurrer, unless the objection to the indictment has been waived by a failure to demur, and must be made before or at the time the defendant is called for judgment. [Cr. Prac. 1864, §§ 429, 431; R.S., R.C., & C.L., § 7960; C.S., § 9019; I.C.A., § 19-2309.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Sentence and judgment, I.C.R. 33.

Cited in: *In re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927); *Prairie Flour Mill Co. v. Farmers Elevator Co.*, 45 Idaho 229, 261 P. 673 (1927); *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957); *State v. Chauncey*, 97 Idaho 756, 554 P.2d 934 (1976).

ANALYSIS

Defects in indictment.

Failure to demur.

Grounds for motion.

Time for motion.

Waiver.

Defects in Indictment.

Objection of duplicity in information can not be raised for the first time by motion in arrest of judgment. *People v. Nash*, 1 Idaho 206 (1868); *People v. Stapleton*, 2 Idaho 47, 3 P. 6 (1884); *State v. Upham*, 52 Idaho 340, 14 P.2d 1101 (1932); *State v. Knutson*, 47 Idaho 281, 274 P. 108 (1929); *State v. Fong Wee*, 47 Idaho 416, 275 P. 1112 (1929).

Defect in indictment in that it fails to give the legal appellation of offense charged cannot be reached by a motion in arrest. *People v. Stapleton*, 2 Idaho (Hasb.) 47, 3 P. 6 (1884).

That indictment did not charge that deceased died within a year and a day, cannot be raised by motion in arrest where it had not previously been raised by demurrer and no showing was made that the accused was misled to his prejudice. *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901).

Failure to Demur.

Where no demurrer to the information had first been interposed, trial court's overruling of motion in arrest of judgment which was joined with motion for new trial, was correct. *State v. Laws*, 94 Idaho 200, 485 P.2d 144 (1971).

Grounds for Motion.

Motion in arrest not assigning ground for demurrer is properly overruled. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Smailes*, 51 Idaho 321, 5 P.2d 540 (1931).

Variance between information and proof is not ground for motion in arrest. *State v. Frank*, 51 Idaho 21, 1 P.2d 181 (1931).

That evidence was insufficient to sustain conviction is not ground for motion in arrest. *State v. Frank*, 51 Idaho 21, 1 P.2d 181 (1931).

Court did not err in overruling motion of defendant for arrest of judgment where defendant failed to file a demurrer to the information. *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951).

The validity of an ordinance under which a conviction is had may be challenged by a motion for arrest of judgment. *Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956).

Time for Motion.

Motion in arrest must be made before or at the time defendant is called for judgment. *State v. Ensign*, 38 Idaho 539, 223 P. 230 (1924).

Failure to grant motion in arrest made after entry of judgment is not error and cannot be considered on appeal. *State v. Severns*, 47 Idaho 246, 273 P. 940 (1929).

Motion in arrest must be made before or at the time defendant is called for judgment or it will be denied. It is too late on proceedings for execution, after affirmance of judgment of conviction for capital crime, under § 19-2715. *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

An objection to an information that it does not state facts sufficient to constitute a public offense may be made by demurrer or under a plea of not guilty, and after trial by a motion in arrest of judgment. *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955).

Waiver.

Motion in arrest of judgment was not waived where record showed that the trial

court denied the motion. *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955).

Assuming that criminal procedure rules applied to contempt proceedings to enforce support order the defendant waived defect or irregularity in affidavit to show cause where defendant failed to object to affidavit at time of trial. *In re Martin*, 76 Idaho 179, 279 P.2d 873 (1955).

19-2409. Arrest without motion. — The court may also, on its own view of any of these defects, arrest the judgment without motion. [Cr. Prac. 1864, § 430; R.S., R.C., & C.L., § 7961; C.S., § 9020; I.C.A., § 19-2310.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957).

19-2410. Effect of sustaining motion. — The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found. [Cr. Prac. 1864, § 432; R.S., R.C., & C.L., § 7962; C.S., § 9021; I.C.A., § 19-2311.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

Collateral References. 21A Am. Jur. 2d Criminal Law, §§ 785 — 790.

23A C.J.S. Criminal Law, §§ 1453 — 1457.

Evidence, power of trial court to dismiss defendant for insufficiency of, after submitting case to jury or after verdict of guilty. 131 A.L.R. 187.

Validity of Ordinance.

The validity of the ordinance under which a conviction is had may be challenged by a motion for arrest of judgment. *Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956).

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Slater*, 72 Idaho 383, 241 P.2d 1189 (1952).

19-2411. Discharge or detention of defendant. — If, from the evidence on the trial, there is reason to believe the defendant guilty, and a new indictment can be framed, upon which he may be convicted, the court may order him to be recommitted to the office of the proper county, or admitted to bail anew, to answer the new indictment. If the evidence shows him guilty of another offense, he must be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution or indictment. But if no evidence appears sufficient to charge him with any offense he must, if in custody, be discharged; or if admitted to bail, his bail is exonerated; or if money has been deposited instead of bail, it must be refunded to the defendant; and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment was founded. [Cr. Prac. 1864, § 433; R.S., R.C., & C.L., § 7963; C.S., § 9022; I.C.A., § 19-2312.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Slater*, 72 Idaho 383, 241 P.2d 1189 (1952).

CHAPTER 25

JUDGMENT

SECTION.

- 19-2501. Time for judgment.
- 19-2502. Determination of degree of crime.
- 19-2503. Presence of defendant.
- 19-2504. Defendant to be brought before court.
- 19-2505. Bench warrant to enforce attendance.
- 19-2506. Clerk to issue warrant.
- 19-2507. Form of warrant.
- 19-2508. Service of warrant.
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- 19-2510. Arraignment for sentence.
- 19-2511. Grounds for withholding judgment.
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- 19-2514. Persistent violator — Sentence on third conviction for felony.
- 19-2515. Sentence in capital cases — Special sentencing proceeding — Statutory aggravating circumstances — Special verdict or written findings.
- 19-2515A. Imposition of death penalty upon mentally retarded person prohibited.
- 19-2516, 19-2517. [Repealed.]
- 19-2518. Lien of judgment for fine.

SECTION.

- 19-2519. Entry of judgment — Record.
- 19-2520. Extended sentence for use of firearm or deadly weapon.
- 19-2520A. [Repealed.]
- 19-2520B. Infliction of great bodily injury — Attempted felony or conspiracy — Extension of prison term.
- 19-2520C. Extension of prison terms for repeated sex offenses, extortion and kidnapping.
- 19-2520D. Prior foreign conviction.
- 19-2520E. Multiple enhanced penalties prohibited.
- 19-2520F. Consecutive sentences for felonies committed in correctional facilities.
- 19-2520G. Mandatory minimum sentencing.
- 19-2521. Criteria for placing defendant on probation or imposing imprisonment.
- 19-2522. Examination of defendant for evidence of mental condition — Appointment of psychiatrists or licensed psychologists — Hospitalization — Reports.
- 19-2523. Consideration of mental illness in sentencing.

19-2501. Time for judgment. — After a plea or verdict of guilty, or after a verdict against the defendant on the plea of a former conviction or acquittal, if the judgment be not arrested or a new trial granted, the court must appoint a time for pronouncing judgment, which, in cases of felony, must be at least two days after the verdict, if the court intend to remain in session so long; but if not, then at as remote a time as can reasonably be allowed. [Cr. Prac. 1864, §§ 434, 435; R.S., R.C., & C.L., § 7980; C.S., § 9023; I.C.A., § 19-2401.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Sentence and judgment, I.C.R. 33.

Cited in: State v. Ogata, 95 Idaho 309, 508 P.2d 141 (1973); State v. Knight, 106 Idaho 496, 681 P.2d 6 (Ct. App. 1984).

ANALYSIS

Application.
Constitutionality.

Application.

There is no error committed in passing judgment upon defendant while motion for new trial is pending and undisposed of. State v. Chacon, 36 Idaho 148, 209 P. 889 (1922), overruled on other grounds, State v. Higgins, 122 Idaho 590, 836 P.2d 536 (1992).

If jury fails to decide penalty after trial and conviction of murder in first degree, court must pronounce judgment. State v. Arnold, 39 Idaho 589, 229 P. 748 (1924).

On plea of guilty to charge of murder, court should take evidence to determine the degree. State v. Arnold, 39 Idaho 589, 229 P. 748 (1924).

Pronouncing sentence on same day as arraignment and plea of guilty is not reasonable

time required by this section. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

Upon an affidavit that defendant's plea of guilty to a charge of first degree murder was not made voluntarily and understandingly, and record discloses failure to comply with statutory provisions for arraignment, plea and judgment, the trial court was in error in refusing to allow withdrawal of the plea. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

Constitutionality.

The sentencing provisions of §§ 19-2501 to 19-2521 satisfy the guidelines from the various holdings of the United States Supreme Court in death penalty cases. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); see also *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1991).

Collateral References. 21A Am. Jur. 2d, Criminal Law, § 791 et seq.

24 C.J.S., Criminal Law, §1458 et seq.

19-2502. Determination of degree of crime. — Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree. [R.S., R.C., & C.L., § 7981; C.S., § 9024; I.C.A., § 19-2402.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Powell*, 71 Idaho 131, 227 P.2d 582 (1951); *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967).

ANALYSIS

Application.

In general.

Application.

Court may of its own motion hear evidence in aggravation or mitigation of punishment before passing sentence. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Whether death sentence or life imprisonment shall be the punishment for first degree

Voluntary absence of accused when sentence is pronounced. 6 A.L.R.2d 997.

Validity of sentence fixing identical minimum and maximum terms of imprisonment. 29 A.L.R.2d 1344.

Intermittent incarceration, power of court to impose sentence providing for. 39 A.L.R.2d 985.

Mistaken belief in existence, validity, or effect of divorce or separation as mitigating punishment for bigamy or allied offense. 56 A.L.R.2d 915, 938.

Propriety of general sentence covering several counts in information or indictment not exceeding in aggregate the sentences which might have been imposed cumulatively under the several counts. 91 A.L.R.2d 511.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 A.L.R.2d 768.

Racial discrimination in punishment for crime. 40 A.L.R.3d 227.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 A.L.R.3d 1291.

murder is a question addressed to the sound discretion of the court or jury and will be modified on review only when abused. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Pronouncing sentence on same day as arraignment and plea of guilty without any effort to comply with provisions of this section in determining degree of crime is erroneous. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

In General.

This section does not remove the trial court's determination of the degree of offense committed from the power and authority of the Supreme Court to intervene where law and justice requires. *State v. Haggard*, 89 Idaho 217, 404 P.2d 580 (1965).

In complying with this section, the better procedure would be to take evidence at a recorded hearing regarding the circumstances of the alleged offense. *Bement v. State*, 91 Idaho 388, 422 P.2d 55 (1966).

19-2503. Presence of defendant. — For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence. [Cr. Prac. 1864, § 436; R.S., R.C., & C.L., § 7982; C.S., § 9025; I.C.A., § 19-2403.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Poynter*, 34 Idaho 504, 205 P. 561 (1921); *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983); *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983); *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

ANALYSIS

Consecutive action.
Correction of invalid sentence.
Institutional review.
Presence mandatory.
Presence not required.
Waiver.

Consecutive Action.

I.C.R. 43(a) and this section require the presence of defense counsel when sentence is pronounced; however, where the district judge imposed a valid sentence in the presence of counsel, his subsequent action in having defendant brought back before him and clarifying that sentence was consecutive and not concurrent, and the fact that counsel was not present did not change that valid sentence. *State v. Lawrence*, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986).

Correction of Invalid Sentence.

The original sentence imposed on defendant which contained two separate enhancements, was invalid since it violated § 19-2520E, and the trial court could not correct the sentence without the defendant being present. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993); *State v. Searcy*, 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991).

Institutional Review.

Defendant's due process rights were not violated where he was denied counsel at his institutional review hearings, nor were these

rights violated when the court relinquished its jurisdiction, ordering execution of defendant's sentence without holding another hearing. *State v. Bell*, 119 Idaho 1015, 812 P.2d 322 (Ct. App. 1991).

Presence Mandatory.

A defendant's presence at the time of sentencing is mandatory, not discretionary; thus, where the original sentence was invalid, the defendant should have been present at the second proceeding at which the sentence was corrected. *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).

Where defendant's original sentence was invalid, sentence was not imposed until the trial court corrected the judgment; thus, defendant's presence at the time of resentencing was mandatory. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Where defendant was not present at the hearing on his ICR 35 motion and his counsel went forward with the hearing, not objecting to defendant's absence, defendant did not waive his right to be present at his sentencing, nor was there any acquiescence on his part in the ex parte procedure used to "correct" the illegal sentence. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Presence Not Required.

The district court's determination that manslaughter sentences were not illegal was not a modification of defendant's sentences made without the defendant being present in violation of this section and I.C.R. 43. *State v. Dallas*, 126 Idaho 273, 882 P.2d 440 (Ct. App. 1994).

Waiver.

While it is error to sentence a felony defendant in his absence, such an error is not jurisdictional and may be waived as an issue on appeal. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

19-2504. Defendant to be brought before court. — When the defendant is in custody the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so. [Cr. Prac. 1864, § 437; R.S., R.C., & C.L., § 7983; C.S., § 9026; I.C.A., § 19-2404.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2505. Bench warrant to enforce attendance. — If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for judgment when his personal appearance is necessary,

the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest. [Cr. Prac. 1864, § 438; R.S., R.C., & C.L., § 7984; C.S., § 9027; I.C.A., § 19-2405.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2506. Clerk to issue warrant. — The clerk, on the application of the prosecuting attorney, may, at any time after the order, whether the court be sitting or not, issue a bench warrant into one or more counties. [Cr. Prac. 1864, § 439; R.S., R.C., & C.L., § 7985; C.S., § 9028; I.C.A., § 19-2406.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2507. Form of warrant. — The bench warrant must be substantially in the following form:

County of _____.

The state of Idaho, to any sheriff, constable, marshal or policeman in this state:

A.B., having been on the _____ day of _____, 19__ duly convicted in the district court of the _____ judicial district of the state of Idaho, in and for the county of _____, of the crime of _____ (designating it generally), you are therefore commanded forthwith to arrest the above named A.B. and bring him before that court for judgment; or if the court has adjourned for the term, that you deliver him into the custody of the sheriff of the county of _____.

Given under my hand, with the seal of said court affixed, this _____ day of _____, 19__.

By order of the court.

(Seal)

E. F., Clerk.

[Cr. Prac. 1864, § 440; R.S., R.C., & C.L., § 7986; C.S., § 9029; I.C.A., § 19-2407.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Chauncey, 97 Idaho 756, 554 P.2d 934 (1976).

19-2508. Service of warrant. — The bench warrant may be served in any county in the same manner as a warrant of arrest, and when served in another county it need not be endorsed by a magistrate of that county. [Cr. Prac. 1864, § 441; R.S., R.C., & C.L., § 7987; C.S., § 9030; I.C.A., § 19-2408.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2509. Arrest of defendant. — Whether the bench warrant is served in the county in which it was issued or in another county, the officer must arrest the defendant and bring him before the court or commit him to the officer mentioned in the warrant, according to the command thereof. [Cr. Prac. 1864, § 442; R.S., R.C., & C.L., § 7988; C.S., § 9031; I.C.A., § 19-2409.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-2510. Arraignment for sentence. — When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the indictment and of his plea, and the verdict if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him. [Cr. Prac. 1864, § 443; R.S., R.C., & C.L., § 7989; C.S., § 9032; I.C.A., § 19-2410.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Starkey v. State*, 91 Idaho 74, 415 P.2d 717 (1966); *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967).

In General.

Noncompliance with provisions of this section after plea of guilty, which is claimed to be involuntary and upon advice of inexperienced counsel, is erroneous; especially when arraignment, plea, and judgment were all had on same day. *State v. Poglianich*, 43 Idaho 409, 252 P. 177 (1927).

Collateral References. Necessity and sufficiency of recital of, or reference to, the offense in pronouncing sentence or judgment. 14 A.L.R. 989.

Constitutionality of statute conferring on court power to suspend sentence. 26 A.L.R. 399; 101 A.L.R. 402.

Oral announcement of sentence without entry in records, effect of. 59 A.L.R. 521.

Court's attempt to fix the beginning of period of imprisonment. 69 A.L.R. 1177.

When sentences imposed by same court run concurrently or consecutively; and definiteness of direction with respect thereto. 70 A.L.R. 1511.

Waiver of right to review conviction by

serving sentence. 74 A.L.R. 641.

Habeas corpus, sentence designating improper place of imprisonment as ground for. 76 A.L.R. 510.

Right of court to hear evidence for purpose of determining sentence to be imposed. 77 A.L.R. 1211.

Election by defendant as to punishment where statutory provision as to punishment is changed after commission of offense but before conviction, right of. 103 A.L.R. 1041.

Are sentences on different counts to be regarded as for a single term or for separate terms as regards suspension of sentence. 107 A.L.R. 634.

Parole or conditional release, sentence for new offense committed while accused was at large on, as concurrent or consecutive. 116 A.L.R. 811.

Power of court to set aside sentence after commitment or payment of fine. 168 A.L.R. 706; 26 A.L.R.4th 905; 28 A.L.R.4th 147.

Right to notice and hearing before revocation of suspension of sentence. 29 A.L.R.2d 1074.

Interrogation of defendant as to whether he has anything to say why sentence should not be pronounced against him, necessity and sufficiency of, and effect of failure to make inquiry. 96 A.L.R.2d 1292.

Loss of jurisdiction by delay in imposing sentence. 98 A.L.R.3d 605.

Power of court to increase severity of unlawful sentence — modern cases. 28 A.L.R.4th 147.

19-2511. Grounds for withholding judgment. — He may show, for cause against the judgment that he has good cause to offer, either in arrest of judgment or for a new trial, in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial. [Cr. Prac. 1864, § 444; R.S., R.C., & C.L., § 7990; C.S., § 9033; I.C.A., § 19-2411; am. 1970, ch. 31, § 14, p. 61.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 15 of S.L. 1970, ch. 31 repealed

§§ 19-2320, 19-2709 — 19-2712, and 19-3301 — 19-3307.

Section 13 of S.L. 1970, ch. 31 is compiled as § 19-1715.

Section 16 of S.L. 1970, ch. 31 declared an emergency. Approved February 19, 1970.

Cited in: State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957).

19-2512. Pronouncement of judgment. — If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered. [Cr. Prac. 1864, § 445; R.S., & R.C., § 7991; reen. 1915, ch. 104, § 1, p. 244; reen. C.L., § 7991; C.S., § 9034; I.C.A., § 19-2412.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The remainder of amendatory act of 1915, ch. 104, § 1 appears as §§ 19-2601 — 19-2605.

ANALYSIS

Determination of punishment.

Effect of error in sentence.

Suspension of sentence.

Determination of Punishment.

Court must pronounce judgment though jury has failed to decide which punishment shall be inflicted. State v. Arnold, 39 Idaho 589, 229 P. 748 (1924).

In a prosecution where court has discretion to sentence to penitentiary for felony or jail for misdemeanor, the court may sentence some defendants to penitentiary and others to jail. State v. Farnsworth, 51 Idaho 768, 10 P.2d 295 (1932).

Effect of Error in Sentence.

Where sentence contains provisions unwarranted by law, prescribing a minimum and maximum sentence different from that provided by law, such judgment is not void except

as to such unwarranted provisions and should not be interpreted in light of the law upon which it is based, and minimum fixed by the statutes should be read into and considered as part of sentence and mittimus. In re Setters, 23 Idaho 270, 128 P. 1111 (1913). However, see Spanton v. Clapp, 78 Idaho 234, 299 P.2d 1103 (1956) which overrules In re Setters, holding that a sentence of less than the prescribed statutory period could not be extended by the board of corrections where the state had made no motion to correct the sentence and had not appealed it.

It is general rule that where sentence consists of void and valid portions which are severable, courts will give effect to valid portion. In re Jennings, 46 Idaho 142, 267 P. 227 (1928).

Suspension of Sentence.

Prior to enactment of § 19-2601 et seq., court had no authority to suspend a sentence. In re Peterson, 19 Idaho 433, 113 P. 729, 33 L.R.A. (n.s.) 1067 (1911).

Order suspending sentence without authority, made part of judgment or attached to it, is surplusage and may be disregarded. In re Jennings, 46 Idaho 142, 267 P. 227 (1928).

Collateral References. Resentencing after imposing illegal sentence under ex post facto amendment increasing punishment for crime. 167 A.L.R. 882.

19-2513. Unified sentence. — Whenever any person is convicted of having committed a felony, the court shall, unless it shall commute the sentence, suspend or withhold judgment and sentence or grant probation, as

provided in chapter 26, title 19, Idaho Code, or unless it shall impose the death sentence as provided by law, sentence such offender to the custody of the state board of correction. The court shall specify a minimum period of confinement and may specify a subsequent indeterminate period of custody. The court shall set forth in its judgment and sentence the minimum period of confinement and the subsequent indeterminate period, if any, provided, that the aggregate sentence shall not exceed the maximum provided by law. During a minimum term of confinement, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service except as provided in section 20-223(f), Idaho Code. The offender may be considered for parole or discharge at any time during the indeterminate period of the sentence and as provided in section 20-223(f), Idaho Code.

If the offense carries a mandatory minimum penalty as provided by statute, the court shall specify a minimum period of confinement consistent with such statute. If the offense is subject to an enhanced penalty as provided by statute, or if consecutive sentences are imposed for multiple offenses, the court shall, if required by statute, direct that the enhancement or each consecutive sentence contain a minimum period of confinement; in such event, all minimum terms of confinement shall be served before any indeterminate periods commence to run.

Enactment of this amended section shall not affect the prosecution, adjudication or punishment of any felony committed before the effective date of enactment. [1909, p. 82, H.B. 214, § 1; am. 1911, ch. 200, § 1, p. 664; compiled and reen. C.L., § 7991a; C.S., § 9035; I.C.A., § 19-2413; am. 1947, ch. 46, § 1, p. 50; am. 1957, ch. 47, § 1, p. 82; am. 1970, ch. 143, § 1, p. 425; am. 1986, ch. 232, § 3, p. 638; am. 1993, ch. 106, § 2, p. 271.]

Title of 1986 Act. Section 1 of S.L. 1986, ch. 232 read: "This act shall be known as the Unified Sentencing Act of 1986."

Compiler's notes. Section 2 of S.L. 1986, ch. 232 is compiled as § 18-4004, § 4 contains a repeal and § 5 is compiled as § 20-223.

Section 1 of S.L. 1993, ch. 106 is compiled as § 20-223.

Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 19-2520C or 19-2520D, Idaho Code."

Cross ref. Determination of punishment between certain limits, § 18-107.

Determination of punishment for felony where no other penalty prescribed, § 18-112.

Sec. to sec. ref. This section is referred to in §§ 20-223, 37-2739B.

Cited in: *State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916); *State v. Sprouse*, 63 Idaho 166, 118 P.2d 378 (1941); *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950); *Ex parte Dalton*, 72 Idaho 451, 243 P.2d 594 (1952); *State v. Witzel*, 79 Idaho 211, 312 P.2d 1044 (1957); *Mahaffey v. State*, 87 Idaho 233, 392 P.2d 423 (1964); *State v. Gish*, 89 Idaho 334, 404 P.2d 595 (1965); *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979); *State v. Avery*, 100 Idaho 409, 599 P.2d 300 (1979); *State v. Hoisington*, 105 Idaho 660, 671 P.2d 1362 (Ct. App. 1983); *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983); *State v. Russell*, 109 Idaho 723, 710 P.2d 633 (Ct. App. 1985); *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986); *State v. Hoffman*, 111 Idaho 966, 729 P.2d 441 (Ct. App. 1986); *State v. Burnside*, 113 Idaho 65, 741 P.2d 352 (Ct. App. 1987); *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Bolton*, 114 Idaho 269, 755 P.2d 1307 (Ct. App. 1988); *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988); *State v. Hall*, 114 Idaho 887, 761

P.2d 1239 (Ct. App. 1988); *State v. Garza*, 115 Idaho 32, 764 P.2d 109 (Ct. App. 1988); *State v. Phillips*, 115 Idaho 398, 766 P.2d 1279 (Ct. App. 1988); *State v. Hawkins*, 115 Idaho 719, 769 P.2d 596 (Ct. App. 1989); *State v. Kerr*, 115 Idaho 725, 769 P.2d 602 (Ct. App. 1989); *State v. Averill*, 116 Idaho 181, 774 P.2d 351 (Ct. App. 1989); *State v. Allbee*, 115 Idaho 845, 771 P.2d 66 (Ct. App. 1989); *State v. Hanslovan*, 116 Idaho 266, 775 P.2d 158 (Ct. App. 1989); *State v. Breeding*, 116 Idaho 569, 777 P.2d 1242 (Ct. App. 1989); *State v. Sorrell*, 116 Idaho 966, 783 P.2d 305 (Ct. App. 1989); *State v. Pena*, 117 Idaho 187, 786 P.2d 578 (Ct. App. 1990); *State v. Jagggers*, 117 Idaho 559, 789 P.2d 1150 (Ct. App. 1990); *State v. Fuller*, 118 Idaho 962, 801 P.2d 1313 (Ct. App. 1990); *State v. Johnson*, 119 Idaho 107, 803 P.2d 1013 (Ct. App. 1991); *State v. Caldwell*, 119 Idaho 281, 805 P.2d 487 (Ct. App. 1991); *State v. Bolton*, 119 Idaho 846, 810 P.2d 1132 (Ct. App. 1991); *State v. Robison*, 119 Idaho 890, 811 P.2d 500 (Ct. App. 1991); *State v. Beboer*, 119 Idaho 1020, 812 P.2d 327 (Ct. App. 1991); *State v. Spradlin*, 119 Idaho 1030, 812 P.2d 744 (Ct. App. 1991); *State v. Hansen*, 120 Idaho 286, 815 P.2d 484 (Ct. App. 1991); *State v. Morris*, 120 Idaho 571, 817 P.2d 1095 (Ct. App. 1991); *State v. Gorham*, 120 Idaho 576, 817 P.2d 1100 (Ct. App. 1991); *State v. Jimenez*, 120 Idaho 753, 819 P.2d 1153 (Ct. App. 1991); *State v. Alberts*, 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991); *State v. Browning*, 121 Idaho 239, 824 P.2d 170 (Ct. App. 1992); *State v. Phillips*, 121 Idaho 261, 824 P.2d 192 (Ct. App. 1992); *State v. DeWolfe*, 121 Idaho 337, 824 P.2d 912 (Ct. App. 1992); *State v. Joyner*, 121 Idaho 376, 825 P.2d 99 (Ct. App. 1992); *State v. Gillette*, 121 Idaho 629, 826 P.2d 1341 (Ct. App. 1992); *State v. McCoy*, 121 Idaho 631, 826 P.2d 1343 (Ct. App. 1992); *State v. Kersey*, 121 Idaho 636, 826 P.2d 1348 (Ct. App. 1992); *State v. Martinez*, 122 Idaho 158, 832 P.2d 331 (Ct. App. 1992); *State v. Cervantes*, 122 Idaho 238, 832 P.2d 1173 (Ct. App. 1992); *State v. Brower*, 122 Idaho 450, 835 P.2d 685 (Ct. App. 1992); *State v. Fluery*, 123 Idaho 9, 843 P.2d 159 (Ct. App. 1992); *State v. Tucker*, 123 Idaho 374, 848 P.2d 432 (Ct. App. 1993); *State v. Hill*, 123 Idaho 573, 850 P.2d 220 (Ct. App. 1993); *State v. Hostetler*, 124 Idaho 191, 858 P.2d 331 (Ct. App. 1993); *State v. Koho*, 124 Idaho 194, 858 P.2d 334 (Ct. App. 1993); *State v. Saunders*, 124 Idaho 334, 859 P.2d 370 (Ct. App. 1993); *State v. Salter*, 125 Idaho 418, 871 P.2d 835 (Ct. App. 1994); *State v. Ashley*, 126 Idaho 694, 889 P.2d 723 (Ct. App. 1994); *State v. Viehweg*, 127 Idaho 87, 896 P.2d 995 (Ct. App. 1995); *State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996); *State v. Robertson*, 130 Idaho 287, 939 P.2d 863 (Ct. App. 1997).

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Ambiguity in Sentence.

Where the trial judge in pronouncing a sentence erroneously referred to the "state correctional institution" instead of the "state board of corrections" he did not create an ambiguity in the sentence which required appellate interference since no one was misled by the slip of the tongue. *State v.*

Stormoen, 103 Idaho 83, 645 P.2d 317 (1982).

Application.

Though this section is primarily for the purpose of permitting the state board of pardons to determine the actual period of confinement it does not give the board the right to impose a sentence in a criminal case. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

The sentencing judge is permitted to specify a minimum period of confinement which is treated as the probable duration of confinement when a sentence is imposed under this section. *State v. Bjorklund*, 126 Idaho 656, 889 P.2d 90 (Ct. App. 1994).

The argument that § 19-2514 imposes a mandatory sentence by analogy to this section was rejected by the appellate court, since statutory amendment by implication is disfavored and the state submitted no evidence of legislative support for such amendment. *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).

Burden of Proof.

In deference to the discretionary authority vested in the trial courts, an appellate court will not substitute its view for that of the sentencing judge where reasonable minds might differ. The appellant must show that, under any reasonable view of the facts, his sentence was excessive in light of the criteria of protection of society, retribution, deterrence and rehabilitation. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Burglary.

The maximum penalty for burglary being 5 years, the minimum fixed by the indeterminate sentence law is two and a half years. *State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132 (1939).

Where the court imposed its sentence only after noting that defendant had been convicted of three separate burglaries before sentencing on the instant charge, since 1988 defendant had been charged with eight burglaries, only five of which have been prosecuted, and he had been released on bail and was awaiting sentencing on another burglary conviction when he committed the instant offense there was no abuse of discretion in the sentence, and no error. *State v. Simmons*, 120 Idaho 672, 818 P.2d 787 (Ct. App. 1991).

Defendant was sentenced to five years with three years' minimum confinement on each burglary charge and to eight years with four years' minimum confinement on each grand theft offense, and where defendant had pled guilty to avoid eight additional felony counts and had a lengthy juvenile record, the sentences imposed were reasonable, and the district court did not abuse its sentencing discretion. *State v. Rocklitz*, 120 Idaho 703, 819 P.2d 121 (Ct. App. 1991).

The district judge did not abuse his discre-

tion by imposing two concurrent sentences, consisting of two years fixed and six years indeterminate, without retaining jurisdiction for first degree burglary and grand theft where defendant had recently turned 18 years old at the time of the burglary, and he and his accomplice burglarized the home involved, at night, on more than one occasion, took many miscellaneous items from the home and pawned some of them and "trashed" others and the presentence report indicated that defendant had committed various offenses as a juvenile which were equivalent to first degree burglary, grand theft, probation violations and other crimes. *State v. Christensen*, 121 Idaho 769, 828 P.2d 332 (Ct. App. 1992).

Where defendant was an 18-year-old college student with no prior felony convictions but the presentence report disclosed juvenile offenses, including theft of radios from state and county owned vehicles, as well as seven probation violations and a commitment to the custody of the Department of Health and Welfare, the unified sentence of eight years, with two years fixed, for conviction of first degree burglary and theft, was not an abuse of discretion. *State v. Auger*, 121 Idaho 770, 828 P.2d 333 (Ct. App. 1992).

Sentence of five years, with a two-year minimum period of confinement, for second degree burglary, was not an abuse of discretion where burglary charge arose when defendant broke into a woman's home to watch her while she was taking a bath, defendant later admitted to the police that he had removed four pairs of panties and four brassieres from the residence, he also admitted that he had entered the home on other occasions also, to watch the woman and her daughter while they bathed or while they were asleep, he related that he would sexually stimulate himself while watching the woman, desired to develop a sexual relationship with her, and "was on the verge of committing a rape." *State v. Saxton*, 121 Idaho 781, 828 P.2d 344 (Ct. App. 1992).

A fixed sentence of two years followed by an indeterminate term of three years for second degree burglary was not unreasonable where defendant had a prior criminal record, including two felony convictions as an adult, defendant was on parole for an auto theft conviction in California at the time he committed the current offense and the presentence investigator stated that defendant appeared to be a manipulative individual who showed no remorse for his victims, and concluded that he was not a suitable candidate for probation. *State v. Sands*, 121 Idaho 1023, 829 P.2d 1372 (Ct. App. 1992).

Where the district court in its sentencing comments noted that defendant's criminal record was one of the worst the court had ever

seen considering defendant's young age, the sentences imposed for burglary, grand theft, and malicious injury to property were affirmed. *State v. Marsh*, 122 Idaho 854, 840 P.2d 398 (Ct. App. 1992).

A five-year unified sentence, with four years' minimum confinement for second degree burglary, to be served concurrently with a preexisting grand theft sentence was reasonable where defendant was on probation for the preexisting grand theft charge at the time the present burglary offense was committed. *State v. Branning*, 123 Idaho 977, 855 P.2d 62 (Ct. App. 1993).

Unified sentence of 15 years, with five years minimum confinement for burglary, was reasonable and was not an abuse of the court's sentencing discretion where defendant released on to the ground of his former employer's building 13,000 gallons of a chemical mixture hoping to "shut down" the company and where defendant had a history of antisocial behavior indicating a willingness to violate the rights of others. *State v. Morris*, 123 Idaho 989, 855 P.2d 74 (Ct. App. 1993).

Sentence of ten years with a minimum of five years' confinement for a conviction of burglary was not an abuse of discretion where the record showed that defendant had ten previous theft related offenses, and the underlying recommendation by the presentence investigator was for a period of incarceration in a state correctional facility rather than a state mental hospital. *State v. Clay*, 859 P.2d 365 (Ct. App. 1993).

Construction.

This section impliedly repeals §§ 18-106, 18-107, so far as they are inconsistent with it. In *re Erickson*, 44 Idaho 713, 260 P. 160 (1927), overruled on other grounds, *Sparton v. Clapp*, 78 Idaho 239, 299 P.2d 1103 (1956).

Since indictment can charge but one offense, plea of guilty thereon will not warrant sentence on each of counts contained therein. In *re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927).

Construction with Other Laws.

There is no constitutional violation in allowing the state department of corrections, a department of the executive branch, to insert an escape sentence between the fixed and indeterminate portions of another sentence imposed by the judiciary. *Doan v. State*, 132 Idaho 796, 979 P.2d 1154 (1999).

Correction of Sentence.

State board of correction did not have power or authority to increase sentence of defendant from one to five years for conviction of the crime of issuing a check without funds where district court sentenced the defendant for one year instead of the statutory period of five years, since the district court did not correct the sentence, and the state did not file

a motion to correct the sentence or take an appeal from said sentence. *Sparton v. Clapp*, 78 Idaho 234, 299 P.2d 1103 (1956).

Deportation.

Where the district court did not order defendant's deportation, but merely made a provision conditioning the suspension of his sentence upon the likely event that he would be deported by a proper federal authority, conviction and sentence for possession of cocaine with intent to deliver was affirmed; such provision in a sentence is not an abuse of judicial discretion. *State v. Martinez*, 129 Idaho 411, 925 P.2d 832 (1996).

Due Process.

A defendant in a first-degree murder trial was not denied due process because the state did not formally notify him that it was seeking the death penalty or forewarn him as to which aggravating circumstances it would seek to prove beyond a reasonable doubt at the sentencing hearing where upon pleading guilty to a charge of first-degree murder, the defendant was informed that he could be sentenced to death, or to a determinate or indeterminate sentence of life imprisonment and the record reflected that the court made the sentencing possibilities abundantly clear to the defendant more than once during the proceedings and at each point in the proceedings where the plea of the defendant was discussed. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Effect of Erroneous Sentence.

Where prisoner erroneously is not sentenced under this law, sentence is not void ab initio. Prisoner cannot be discharged on habeas corpus until he has performed so much of sentence as was within the power of court to impose. In *re Chase*, 18 Idaho 561, 110 P. 1036 (1910).

Eligibility for Parole.

When the minimum period specified by the judge has been served, the individual becomes parole-eligible; he may be released on parole at any time thereafter, during the indeterminate portion of the sentence. *State v. Knight*, 114 Idaho 923, 762 P.2d 836 (Ct. App. 1988).

Enhancements.

An enhancement must share the same fixed or indeterminate characteristics as the sentence imposed for the underlying crime. Consequently, an enhancement imposed for use of a deadly weapon had to be deemed an indeterminate term as a ten-year extension to the indeterminate life sentence imposed for robbery. *State v. Searcy*, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

Excessive Sentence.

In order for defendant to show that his sentence is excessive, he must establish that,

under any reasonable view of the facts, a period of confinement of three years for his conviction of sexual battery of a minor was an abuse of discretion. Where reasonable minds might differ, the court will not substitute its own view for that of the sentencing judge. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

—Sex Offenses.

District court abused its discretion by arriving at an unreasonably harsh sentencing structure of incarceration for sixty years without the possibility of parole for defendant's crimes of rape, forcible sexual penetration with a foreign object and robbery; totality of sentences was more than reasonably necessary to accomplish sentencing goals. Consecutive 25-year determinate terms modified to be served concurrently and consecutive 10-year determinate term for robbery modified to be made indeterminate. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Failure to Set Forth Reasons.

Where the sentencing judge has set forth no reasons for the imposition of a particular sentence, the Court of Appeals will draw its own impressions from the record and affirm what it infers to be a reasonable exercise of the lower court's discretion in pronouncing the sentence under review. *State v. Lopez*, 118 Idaho 620, 798 P.2d 465 (Ct. App. 1990).

Failure to Specify Minimum.

Sentence to indeterminate term of life imprisonment was not defective because it failed to specify a minimum term of confinement. *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct. App. 1983).

Because the district court simply assumed that the defendant would serve at least six years before becoming eligible for parole, but did not, in the judgment and sentencing order, address a minimum period of incarceration without parole eligibility, the court's discretion was improperly exercised. *State v. Knight*, 114 Idaho 923, 762 P.2d 836 (Ct. App. 1988).

Where, although the form of a judgment and order committing a burglary defendant to the custody of the Board of Correction did not specify a minimum period of confinement, it was clear from the transcript of the sentencing hearing that the judge intended to set the defendant's minimum period of confinement at zero. Thus, the court could review the intended sentence for excessiveness because there was no need to remand for resentencing, only for correction of the form of the judgment. *State v. Marquess*, 115 Idaho 136, 765 P.2d 161 (Ct. App. 1988).

Where defendant's crime was committed

prior to the effective date of this section and where no minimum term of confinement was ordered, thus faced with review of a fully indeterminate sentence, and, for the purpose of review, the court deemed one-third of a five-year sentence (a period of 20 months) to be an appropriate measure of the term of confinement. *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1988).

Although the district court failed to specify a minimum period of confinement with regard to a consecutive, three-year indeterminate sentence imposed on defendant on count two of issuing checks without funds, in addition to a three-year fixed sentence on count one, because the record showed that the court intended to set the minimum period of confinement at zero, the sentence did not violate the requirements of this section that the aggregate sentence not exceed the maximum provided by law; yet case had to be remanded for correction of the form of judgment to specify no minimum period of confinement had been ordered on the count two conviction. *State v. Martinsen*, 128 Idaho 472, 915 P.2d 34 (Ct. App. 1996).

Fines.

Indeterminate sentence law applies only to imprisonment and does not apply to fines. *State v. Weise*, 75 Idaho 404, 273 P.2d 97 (1954).

Firearm Penalty.

A firearm penalty must share the same fixed or indeterminate characteristic as the rest of the sentence imposed for the underlying crime; therefore, a defendant may not be sentenced to an indeterminate life sentence enhanced by a consecutive fixed period for the use of a firearm. *State v. Merrifield*, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

Fixed Life Sentence.

A fixed life sentence may be deemed reasonable if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

Focus of Review.

Where a sentence was imposed under this section, appellate review focuses primarily upon the minimum period of confinement specified by the judge. *State v. Sanchez*, 117 Idaho 51, 785 P.2d 176 (Ct. App. 1990).

Improper Sentence.

The trial judge erred in imposing a determinate sentence of 30 years under the provisions of this section where the statute had not been enacted at the time of the commission of the crime for which defendant was sentenced.

State v. Lindquist, 101 Idaho 688, 619 P.2d 1141 (1980).

Idaho law does not allow the imposition of a "fixed indeterminate" sentence. State v. Hoffman, 108 Idaho 720, 701 P.2d 668 (Ct. App. 1985).

Where the record did not show that the defendant could never be safely returned to society on parole, the fixed life sentence for convictions of first degree burglary and sexual abuse of a child was inappropriate. State v. Eubank, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

In a forgery conviction, considering the non-violent nature of the crime, the background and character of the defendant and the protection of the public interest, the three years' minimum incarceration was unreasonable as the period of time necessary to temporarily protect society from defendant or to accomplish any of the goals of deterrence, rehabilitation or punitive retribution because these purposes reasonably could be served by a minimum period of incarceration of less than three years; a period of two years would be sufficient. State v. Joslin, 120 Idaho 462, 816 P.2d 1019 (Ct. App. 1991).

Indeterminate Period.

While former §§ 19-2513 (prior to its 1986 amendment) and 2513A (repealed in 1986) were in force, if the sentencing court did not order that the sentence be served entirely in confinement as a fixed or determinate period without eligibility for parole, the sentence must have been deemed automatically to be for an indeterminate period in which the offender, when eligible under the rules and regulations of the Commission of Pardons and Parole, could have served the balance of the sentence on parole or release from confined custody. State v. DuVal, 126 Idaho 33, 878 P.2d 207 (Ct. App. 1994).

Maximum Sentence.

Under this section any attempt by trial court to fix a maximum sentence in criminal case, where such sentence is fixed by law, is surplusage. In re Setters, 23 Idaho 270, 128 P. 1111 (1913), overruled on other grounds, Spanton v. Clapp, 78 Idaho 239, 299 P.2d 1103 (1956); State v. Lottridge, 29 Idaho 822, 162 P. 672 (1917), overruled on other grounds, Spanton v. Clapp, 78 Idaho 239, 299 P.2d 1103 (1956); overruled on other grounds, In re Erickson, 44 Idaho 713, 260 P. 160 (1927).

Warden could not hold prisoner for longer than one year for conviction of rape, where court in fixing maximum sentence set same for a period of not more than one year, since legislature in enacting § 18-6104 gave the district court discretion in setting maximum sentence by providing that sentence could be extended for life at discretion of the trial

court. Storseth v. State, 72 Idaho 49, 236 P.2d 1004 (1951).

Provision in § 18-6607 (now § 18-1508) inflicting punishment of "a term of not more than life" for wilful and lewd or lascivious acts upon the body of a child under the age of 16 through cruel and unusual punishment would be construed as permitting the trial court to fix a maximum sentence of less than life under the Indeterminate Sentence Act, this section. State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952).

Trial court abused discretion in assessing both maximum fine and maximum sentence on conviction for involuntary manslaughter arising out of death in traffic accident where record did not present circumstances of aggravation and fine should be remitted. State v. Weise, 75 Idaho 404, 273 P.2d 97 (1954).

Minimum Sentence.

Under this section, taken together with section 17-3309 I.C.A. (repealed by S.L. 1939, ch. 67, § 1), fixing the penalty for the crime of arson in the first degree at minimum sentence of two years and maximum for life, defendant was legally sentenced to serve maximum term of fifty years, with minimum of twenty-five years. State v. Grant, 26 Idaho 189, 140 P. 959 (1914).

Generally, where a sentence has been imposed under this section, the minimum period of confinement specified in the judgment will be treated as the probable measure of confinement for the purpose of appellate review. State v. Alexander, 115 Idaho 897, 771 P.2d 915 (Ct. App. 1989).

Where a minimum period of confinement has been specified by the judge under the Unified Sentencing Act, the minimum period generally will be treated as the probable measure of confinement for the purpose of sentence review. State v. Sanchez, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989).

Generally, where a unified sentence has been imposed under this section, the minimum period of confinement specified in the judgment will be treated as the probable measure of confinement for the purpose of appellate review. State v. Harper, 116 Idaho 335, 775 P.2d 649 (Ct. App. 1989).

In order to prevail on appeal, defendant must establish that, under any reasonable view of the facts, a period of the minimum term of confinement for his convictions for two counts of sexual abuse of a minor was an abuse of discretion. State v. Morrison, 119 Idaho 229, 804 P.2d 1360 (Ct. App. 1991).

Generally, the minimum period of confinement specified by the judge under the Uniform [Unified] Sentencing Act will be considered the probable measure of confinement for purposes of sentence review. State v. Snow, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

When reviewing a sentence imposed under the Unified Sentencing Act, the court treats the minimum period specified by the sentencing judge as the probable duration of confinement and will not assess the reasonableness of the indeterminate sentence. Any inquiry into possible incarceration beyond the minimum term, and future parole determinations by the Commission of Pardons and Parole is premature and beyond the scope of the court's review. Therefore, defendant's course of redress for unreasonable confinement beyond his minimum term exists in filing a petition for writ of habeas corpus after he becomes eligible for parole. *State v. Warnell*, 124 Idaho 729, 864 P.2d 175 (Ct. App. 1993).

A trial court, when sentencing a person convicted of a felony under the Unified Sentencing Act, must specify a minimum period of confinement (the fixed portion of the sentence) which may be followed by an indeterminate period. *State v. Coffelt*, 127 Idaho 439, 901 P.2d 1340 (Ct. App. 1995).

Murder.

If a sentence of imprisonment is imposed for murder in the first degree, it must be for life, although it may be either an indeterminate life sentence or a fixed life sentence. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Provisions of § 18-4004 relative to second degree murder are not "specific" provisions which conflict with the Unified Sentencing Act. *State v. Paul*, 118 Idaho 717, 800 P.2d 113 (Ct. App. 1990).

With regard to a conviction for second degree murder, the district court was constrained to pronounce an overall sentence that could not be less than ten years, and the sentence could extend to life imprisonment. While the district court had to pronounce some minimum period of incarceration, the length of the mandatory minimum component was properly determined solely by the exercise of the court's sound discretion; thus an indeterminate life sentence with a minimum confinement period of 12 years was upheld upon appeal. *State v. Paul*, 118 Idaho 717, 800 P.2d 113 (Ct. App. 1990).

A life sentence with a 35 year minimum period of confinement for murder was reasonable where defendant had stabbed victim 11 times in order to take his money, credit cards and vehicle after the victim had offered defendant and companion food and shelter, defendant had a troubled background, and defendant showed no remorse for taking victim's life. *State v. Brewer*, 122 Idaho 213, 832 P.2d 1148 (Ct. App. 1992).

A sentence of life in the custody of the Board of Correction with a minimum period of confinement of 25 years for murder in the first degree was reasonable where victim offered

food and a place to stay to defendants, yet defendant later stabbed victim to death with a butcher knife and absconded with victim's car and other valuables. *State v. Weinmann*, 122 Idaho 631, 836 P.2d 1092 (Ct. App. 1992).

Where the gravity of the offense, infanticide through battery by striking of a six-week-old child in a moment of rage, was sufficiently egregious to justify an exceptionally severe measure of retribution and deterrence, a sentence of life with the entire sentence to be served as a minimum term of confinement was reasonable. *State v. Pederson*, 124 Idaho 179, 857 P.2d 658 (1993).

A unified sentence under § 19-2513 of 27 years, with a 12-year minimum period of confinement, for second degree murder, and a consecutive indeterminate term of five years for the use of a firearm in the commission of the crime, was within statutory limits for second degree murder under this section. *State v. Sengthavisouk*, 126 Idaho 881, 893 P.2d 828 (Ct. App. 1995).

The district court did not abuse its discretion in imposing a unified life sentence, with the first 25 years determinate under the Unified Sentencing Act where the defendant, convicted of murder in the second degree, had an extensive record of juvenile crime, probation violations, and failures at rehabilitation. *State v. Espinoza*, 127 Idaho 194, 898 P.2d 1105 (Ct. App. 1995).

Parole.

Determination of whether or not an inmate has served a commensurate amount of his sentence such that he is eligible for parole rests with the Department of Corrections pursuant to § 20-223, and not with the sentencing judge; district court below correctly decided that defendant was not entitled to post-conviction relief in an effort to challenge the authority of the parole commission to decide that a prisoner should not be released on parole until a point in time after the expiration of the minimum period of confinement ordered by the sentencing judge and specified under this section. *State v. Nickerson*, 126 Idaho 818, 892 P.2d 493 (Ct. App. 1995).

Magistrate did not err in denying prisoner's petition for habeas corpus where prisoner's own statements to parole board indicated there was a rational basis for the Commission's decision to deny parole. *Banks v. State*, 128 Idaho 886, 920 P.2d 905 (1996).

Plea Recitation.

Where attorney for defendant charged with kidnapping and raping a 15-year-old girl, stated twice before the district judge that the recommended sentences were appropriate given the plea negotiations entered into by defendant, where the district judge took time to question defendant about the reasonableness of his plea, where the plea of guilty was

conditional in the sense that the judge was bound not to impose a sentence which exceeded the prosecutor's recommendation, where defendant agreed to the recommendation, as shown by the statements of his counsel, and where defendant was told that if the court determined the recommended sentence to be inappropriate, the court would permit defendant to withdraw his guilty plea, under these circumstances, defendant was in a poor situation to question the length of his negotiated sentences for rape and kidnapping in the second degree where he received concurrent unified sentences of 20 years, each with a five-year minimum period of confinement. *State v. Leyva*, 117 Idaho 462, 788 P.2d 863 (Ct. App. 1990).

Probable Duration of Confinement.

Sentence of defendant, convicted on two counts of issuing checks without funds, of a fixed three-year sentence on count one and an indeterminate three-year sentence with no minimum term of confinement specified on count two to be served consecutively, was reasonable and neither excessive nor an abuse of discretion in light of defendant's prior record; in reviewing a sentence imposed under the Unified Sentencing Act, the minimum period specified by the sentencing judge is treated as the probable duration of confinement and thus was three years in this instance. *State v. Martinsen*, 128 Idaho 472, 915 P.2d 34 (Ct. App. 1996).

Where the defendant, if all minimum terms were served before the indeterminate portion of his sentence, would have to serve 15 years, his argument that he would have to serve more than 15 years was nothing more than speculation. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

Considering the nature of defendant's sexual offense against a child, defendant's character, and the need to protect the public, defendant's unified term of 30 years, with seven and one-half years determinate, was not excessive, as the probable duration of defendant's confinement was seven and one-half years. *State v. Knutsen*, 138 Idaho 918, 71 P.3d 1065 (Ct. App. 2003).

Probable Measure of Confinement.

Where a unified sentence has been imposed, and where defendant claims that the sentence is excessive, an appellate court examines the minimum period of confinement established by the sentencing court as the probable measure of confinement. *State v. Heer*, 116 Idaho 969, 783 P.2d 308 (Ct. App. 1989).

In reviewing a sentence under the Unified Sentencing Act, the appellate court treats the minimum period as the probable measure of confinement. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

Proper Sentence.

Defendant's sentences for attempted robbery and aggravated battery were not excessive nor represented an abuse of discretion where trial judge imposed maximum concurrent sentences, 15 years, for each crime and because defendant used a firearm in committing aggravated battery, the court extended the aggravated battery sentence for an additional 15 years, as permitted by § 19-2520; for each crime the sentencing judge specified that the minimum term of confinement would be the entire length of the sentence and under these sentences defendant must spend 30 years in confinement without the possibility of parole. *State v. Sanchez*, 115 Idaho 394, 766 P.2d 1275 (Ct. App. 1988).

The district court did not abuse its sentencing discretion by providing that the first three years of defendant's five year sentence must be spent in confinement. *State v. Biggs*, 115 Idaho 385, 766 P.2d 1266 (Ct. App. 1988).

Defendant's 10-year sentence for first degree burglary was not excessive and the district court did not abuse its sentencing discretion where the evidence showed that defendant had a prior criminal record including numerous burglary and larceny offenses, had been incarcerated at least five previous times, including substantial prison sentences; at the time of his arrest, defendant was on probation for grand theft and he was then 28 years old, with a longtime history of severe drug and alcohol abuse. *State v. Harwood*, 115 Idaho 431, 767 P.2d 274 (Ct. App. 1988).

Sentence of first degree burglary was not excessive where the transcript of the hearing revealed that the court considered the possibility of probation but concluded that defendant's past behavior indicated probation was inappropriate, and in specific recognition of defendant's age and possibility for rehabilitation, the court imposed the indeterminate six-year sentence without requiring that he serve a specific minimum time in confinement. *State v. Marquess*, 115 Idaho 136, 765 P.2d 161 (Ct. App. 1988).

Defendant's three-year sentence for the felony of driving while his driving privileges were suspended requiring him to serve the first year in confinement was not excessive where the evidence showed that he had already been convicted three times for the same offense over a period of less than five years and he had an alarming predilection to repeat offenses for which he had often been sentenced. *State v. Scott*, 115 Idaho 432, 767 P.2d 275 (Ct. App. 1989).

Defendant's sentence for lewd conduct with a minor of an indeterminate term of not more than seven years, at least two years of which must be spent in confinement was not unduly harsh where the evidence indicates that he previously had been convicted of larceny and

a misdemeanor battery and the judge considered aggravating factors to include the physical force and threats defendant used to commit the offense, the fact that he engaged in intercourse with the child, the age of the child—facts that would have permitted the state to charge defendant with forcible rape rather than lewd conduct with a minor. *State v. Shaw*, 115 Idaho 461, 767 P.2d 836 (Ct. App. 1989).

Where defendant's conviction was the result of a scheme to cash forged checks at several banks and he had not been rehabilitated while serving a reduced sentence for a prior felony offense but had persuaded a conspirator to join in the forgery scheme, and that a checkwriting machine was found in his possession at the time of his arrest, the district court did not abuse its discretion in denying defendant's Rule 35 motion and defendant's sentence of 14 years with a required five year minimum to be served was not unduly harsh. *State v. Townsend*, 115 Idaho 460, 767 P.2d 835 (Ct. App. 1989).

Imposition of concurrent 14-year sentences with three-year minimum periods of confinement for two forgery counts, and a concurrent five-year sentence with a three-year minimum confinement period for burglary was not excessive where the judge cited defendant's continuing record of criminal conduct. *State v. Alexander*, 115 Idaho 897, 771 P.2d 915 (Ct. App. 1989).

Identical concurrent 14-year sentences with a minimum period of confinement of ten years for attempted robbery and for first degree burglary were within the maximum penalties allowed by statute and were not excessive, even though no one was hurt and no money taken. *State v. Ellenwood*, 115 Idaho 813, 770 P.2d 822 (Ct. App. 1989).

The court did not abuse its discretion by imposing concurrent sentences with a three-year minimum confinement period upon a defendant convicted on two counts of delivery of a controlled substance, where the defendant sold a half pound of marijuana and two grams of exceptionally pure cocaine to an undercover police officer and defendant's background contained numerous prior misdemeanor offenses. *State v. Escalante*, 115 Idaho 716, 769 P.2d 593 (Ct. App. 1989).

The court properly denied a motion for a reduction of sentence by defendant convicted of possession of controlled substance with intent to deliver and of theft by possession of stolen property where defendant was sentenced to concurrent, unified sentences of seven years with three years minimum confinement and of five years with three years minimum confinement, and where these sentences were well within the statutorily permitted maximum penalties. *State v. Garcia*, 115 Idaho 559, 768 P.2d 822 (Ct. App. 1989).

Where defendant was found guilty of one count of grand theft and of two counts of grand theft by possession of stolen property, a judgment of conviction which imposed concurrent, ten-year sentences with a minimum three-year period of confinement for each count was not an abuse of discretion where the presentence investigation report showed a prior conviction for armed robbery, where defendant had been incarcerated for that robbery and had been on parole for just over 18 months when the offenses occurred, and where the court was concerned with defendant's failure to acknowledge his guilt and with his somewhat violent past. *State v. Cirelli*, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989).

The court did not abuse its discretion in imposing a ten-year sentence with a three-year minimum period of confinement on a defendant convicted of lewd conduct with her minor daughter, where the maximum penalty defendant could have received was life imprisonment, notwithstanding the fact that the defendant lacked a serious criminal history and was a victim of both physical and mental handicaps. *State v. Arnold*, 115 Idaho 736, 769 P.2d 613 (Ct. App. 1989).

Imposition of a ten-year unified sentence with a four-year minimum period of confinement for attempted robbery was not an abuse of discretion in light of the defendant's previous record, his past unsuccessful attempts at rehabilitation and his admitted use and sale of drugs. See *State v. Sommerfeld*, 116 Idaho 518, 777 P.2d 740 (Ct. App. 1989).

A sentence of ten years with a three-year minimum period of confinement was not excessive for a defendant who plead guilty to first-degree arson. *State v. Harper*, 116 Idaho 335, 775 P.2d 649 (Ct. App. 1989).

Where defendant pled guilty to grand theft by possession of stolen property and to possession of a controlled substance, the district court did not abuse its discretion by sentencing defendant on each charge to concurrent one-year minimum periods of confinement, as the sentencing court gave proper consideration to the crimes committed, the background of the defendant, and the sentencing goals of retribution, deterrence, rehabilitation and the protection of society. *State v. Woodman*, 116 Idaho 716, 779 P.2d 30 (Ct. App. 1989).

Where defendant pled guilty to aggravated assault the trial court did not abuse its discretion by imposing a five-year minimum period of confinement, which was equal to the maximum punishment allowed for the charge, in light of the court's concern regarding the defendant's history of violent crime and the fact that defendant was on parole when he committed the charged offense. See

State v. Gibson, 116 Idaho 265, 775 P.2d 157 (Ct. App. 1989).

Judge did not abuse his discretion in sentencing defendant convicted of grand theft for shooting a cow and appropriating the two hindquarters therefrom, to a term not to exceed eight years with a three-year minimum period of confinement, where the judge took defendant's crime, his past criminal activity and his potential for rehabilitation, and balanced them against the need to protect society. State v. Johnson, 117 Idaho 650, 791 P.2d 31 (Ct. App. 1990).

When § 37-2739A is applicable to a given case it is permissible for a sentencing court to order, under this section, a minimum period of incarceration that includes the minimum mandatory requirement of three years as set forth in § 37-2739A. State v. Way, 117 Idaho 594, 790 P.2d 375 (Ct. App. 1990).

A sentence of life imprisonment with a minimum period of confinement of 25 years for a felony murder defendant committed in connection with his attempted robbery of a convenience store was not excessive where the court properly considered goals of sentencing and the sentence imposed was not unreasonable under the particular facts presented. State v. Cambron, 118 Idaho 624, 798 P.2d 469 (Ct. App. 1990).

A sentence of 12 years, with a four-year minimum period of confinement, for a defendant convicted of sexual abuse of a child under 16 years of age, was not excessive where defendant had stated he touched his stepdaughter's breasts because he disliked her; the defendant lacked genuine remorse and the district judge felt that the defendant exhibited the tendency to use threats, intimidation, fear and terror to get his way or to push people around. State v. Jones, 118 Idaho 720, 800 P.2d 116 (Ct. App. 1990).

A fixed, five-year sentence on a sexual abuse charge and an indeterminate life sentence with a five-year minimum period of incarceration on a lewd conduct charge, which were to run concurrently were not excessive nor an abuse of discretion even though the court declined to follow the treatment recommendations of the evaluating psychologists. State v. Bartlett, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990).

In view of defendant's past record of convictions for alcohol-related offenses and the need to protect society from such future harm, relying of the 20-year pattern of the defendant's misuse of alcohol and the fact that a death occurred in this instance, the judge determined that a period of confinement was required and the court acted within its statutory discretion in sentencing the defendant to an indeterminate term of seven years, with four years fixed. State v. Howard, 119 Idaho 100, 803 P.2d 1006 (Ct. App. 1990).

Where defendant, on probation for conspiring to deliver marijuana was charged with first degree burglary in connection with the break-in at a bar, where he pled guilty and was sentenced to 11 years in prison, with a minimum term of three years, and where, in addition, the court revoked his probation on the conspiracy to deliver marijuana conviction and ordered that the previously-imposed sentence be executed and served concurrently with the burglary sentence, the sentence was not unduly severe. State v. Kern, 119 Idaho 295, 805 P.2d 501 (Ct. App. 1991).

Where defendant had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. State v. Arledge, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Where defendant was sentenced to a two year fixed sentence followed by an indeterminate term of four years as the result of being convicted of causing the death of an infant by shaking the child, the public interest in punishing a serious offense, one involving unprovoked violence upon a human being causing his death, amply justified the two-year minimum sentence of confinement imposed. Additionally, the term of confinement ordered furthers the substantive goal of deterrence—specific deterrence, and as defendant's wife was pregnant at the time of sentencing, the sentence thus may be viewed as reflecting society's interest in protecting other infants from the type of dangerous acts which the jury found to have committed upon the victim. State v. Ojeda, 119 Idaho 862, 810 P.2d 1148 (Ct. App. 1991).

A unified sentence of 13 years in the custody of the Board of Corrections with a three year minimum period of confinement was not excessive for a conviction of felony escape with persistent violator enhancement, even though defendant had not been convicted of a violent crime and the county sheriff had testified as to improvement in defendant's conduct while in custody. State v. Holton, 120 Idaho 112, 813 P.2d 923 (Ct. App. 1991).

Unified sentences of 15 years, with a minimum period of confinement of five years, on

two counts of delivery of a controlled substance, heroin, with the sentences to be served concurrently were not unreasonably and excessively harsh and, therefore, did not constitute an abuse of the court's sentencing discretion where facts that defendant was 30 years old, divorced with dependent children, was a reliable and hard worker when employed, had no formal education, had considerable familial support and was well liked by his friends, had no prior criminal record, had one shoplifting conviction five years earlier and did not smoke, drink or use drugs and expressed contrition and repentance over his involvement with these drug transactions were balanced against the nature of the offense; and the protection of the public interest weighed heavily and the period of incarceration clearly reflected the primary objective of the protection of society, and the deterrence both of defendant and other individuals who may be tempted to engage in the distribution of large quantities of heroin or other controlled substances. *State v. Baiz*, 120 Idaho 292, 815 P.2d 490 (Ct. App. 1991).

A sentence of 30 years with a minimum period of confinement of ten years for the robbery of a guard's boots during defendant's escape from a hospital was not excessive. *State v. Knutson*, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991).

Defendant admitted to forcing a girl's car off the road, threatening her and stabbing her several times in the back before she freed herself from him; pursuant to an amended information charging him with aggravated battery with an enhancement for the use of a weapon, a sentence of 30 years, with ten years fixed was not an abuse of discretion. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

The decision whether a sentence is to run consecutively or concurrently with a previous sentence is committed to the sound discretion of the trial court; therefore, where defendant would serve a total of eight years before he again could be released on parole and the court thought that this lengthy period was necessary in order to protect society, the length of this sentence when served consecutively to the previous sentence, did not amount to an abuse of discretion. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Two concurrent unified sentences of 15 years in the custody of the Board of Corrections, with a minimum period of confinement of six years for two counts of first degree burglary, were not unreasonable where the crimes charged were residential burglaries, defendant had a misdemeanor and felony criminal record which was extensive and included previous convictions for first degree burglary and grand larceny and while incar-

cerated on these convictions, he was convicted of felony possession of a controlled substance by an inmate and received a concurrent indeterminate two-year sentence. *State v. Hoffman*, 121 Idaho 131, 823 P.2d 165 (Ct. App. 1991).

Where defendant cashed two checks, each made out to himself on the account of an appliance store, at a grocery store and a bank so that he could purchase cocaine, and defendant had an extensive criminal record, including convictions for burglary and grand theft, two united concurrent sentences of 14 years with a minimum period of confinement of six years, to run consecutively with a two-year period remaining on a previous sentence, was a reasonable sentence. *State v. Ricks*, 120 Idaho 875, 820 P.2d 1232 (Ct. App. 1991).

Where defendant had a prior record of seven DUI offenses, numerous traffic offenses involving alcohol, assault and child endangerment, and a perjury conviction in federal court, the District Court did not abuse its discretion in imposing a five-year term, with two years fixed. *State v. Smith*, 120 Idaho 961, 821 P.2d 1016 (Ct. App. 1991).

Where defendant was charged with kidnapping and assaulting a nine-year-old girl, with the intent of committing a lewd and lascivious act, although defendant did not have a criminal record and had a fairly stable family and work history, a sentence of seven years fixed, followed by an indeterminate period of confinement of 13 years on the kidnapping charge, and a term of five years fixed, to be followed by an indeterminate period of five years on the assault charge was not an abuse of discretion. *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991).

Where defendant was convicted of second degree murder which he committed when he was evidently under the influence of a combination of alcohol and marijuana and there was no real reason for the shooting other than the fact that defendant was in a mean, mad mood because of an argument that occurred earlier in the evening, and where the court appropriately considered the nature of the offense, the character of the offender, and the sentencing objectives in pronouncing the sentence, there was no abuse of discretion in court's imposition of a life sentence with eighteen years required confinement before defendant could be considered for parole. *State v. Thomas*, 126 Idaho 299, 882 P.2d 466 (Ct. App. 1994), overruled on other grounds, *State v. Priest*, 128 Idaho 6, 909 P.2d 624 (1995).

Where the district judge addressed with thoughtful consideration the factors to be considered in sentencing, focused on the nature of the crime, and considered the presentence investigation report, the court did not abuse its discretion in imposing a fixed sentence of 15 years. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

—Arson-Related Offenses.

Where defendant was sentenced to a five-year unified sentence with two-years fixed and three-years indeterminate for burning property not subject to arson, and two one-year terms for firing timber or prairie lands, all to run concurrently, and during the period of retained jurisdiction, the judge decided to decrease the term of the fixed sentence to one year with four-years indeterminate because of defendant's performance in a special program, although the one-year sentence for firing of timber appeared to be illegal, because the sentence ran concurrently with the sentence for burning property not subject to arson, the issue of the illegal sentence was moot, and the other sentence was found to be reasonable in light of the potential danger to property and human life caused by the fire. *State v. Goodson*, 122 Idaho 553, 835 P.2d 1364 (Ct. App. 1992).

—Assault.

A unified sentence of five years with a fixed two-year period of confinement for one count of aggravated assault was confirmed, where defendant, who had an extensive history with the criminal justice system, entered his estranged wife's house, became extremely upset at the sight of his wife and children in the company of another man, chased the man with a butcher knife, and struck his estranged wife. *State v. Cortez*, 122 Idaho 439, 835 P.2d 674 (Ct. App. 1992).

—Bad Checks.

A unified sentence of three years with a minimum period of confinement of two years rather than probation, for one count of issuing a closed account check, was not an abuse of discretion where defendant had previously been charged four times with issuing no-account checks, once with the issuance of an insufficient funds check and once for unauthorized use of a bank check. *State v. Domine*, 121 Idaho 887, 828 P.2d 916 (Ct. App. 1992).

—Battery.

A 15-year unified sentence, with a minimum period of confinement of ten years was reasonable for aggravated battery, where the amended charge of aggravated battery was predicated upon an initial allegation of attempted rape, and defendant was previously charged with aggravated battery against his ex-wife and sexual abuse of his stepdaughter. *State v. Barnes*, 121 Idaho 409, 825 P.2d 506 (Ct. App. 1992).

A unified sentence of 15 years with a minimum period of confinement of ten years for conviction of aggravated battery was not an abuse of discretion where defendant inflicted numerous serious injuries upon the victim, who was his girlfriend, by beating her severely; defendant kicked or stomped on her

with his feet; a glass dining room table was smashed over her body and chairs were piled on top of that; victim was found unconscious in a pool of blood by her landlady and young son; the victim received permanent physical damage and psychological harm, and defendant's criminal record consisted of six felony convictions, including sexual assault, breaking and entering, larceny, and 21 misdemeanors. *State v. Burns*, 121 Idaho 788, 828 P.2d 351 (Ct. App. 1992).

A unified sentence of seven years with one year required as the minimum period of confinement for aggravated battery was reasonable where defendant assaulted victim over a traffic dispute, where the victim and defendant were not acquainted with each other prior to this incident and where the victim's medical expenses for his injuries, hospitalization and reconstructive surgery approximated \$20,000. *State v. Davis*, 123 Idaho 970, 855 P.2d 55 (Ct. App. 1993).

—Driving Under the Influence.

At the time defendant was charged with DUI, he was on probation under a suspended sentence for a previous felony DUI and he disclosed that he had been cited a total of 23 times for DUI in the past 22 years; therefore, the court did not abuse its discretion in imposing a sentence of four years, with a two year period of minimum confinement. *State v. Elliot*, 121 Idaho 786, 828 P.2d 349 (Ct. App. 1992).

Where defendant had previously been convicted 24 times of driving while under the influence, the court reasonably concluded that the unified sentence of five years, with four years' minimum period of confinement was necessary in order to minimize the risk of recurrence of the defendant's criminal conduct. *State v. Wildcat*, 123 Idaho 514, 849 P.2d 975 (Ct. App. 1993).

Sentence of five years, with a one-year period of minimum confinement for driving under the influence was reasonable, where at time defendant was charged, he was on probation under a suspended sentence for a previous felony DUI, and had six previous felony convictions over the preceding eleven years. *State v. Smith*, 124 Idaho 567, 861 P.2d 1232 (Ct. App. 1993).

—Drug Offenses.

Where the sentencing judge imposed a minimum period of confinement of three years for possession of controlled substance with the intent to deliver on the defendant, the sentence was reasonable where it accomplished the primary objective of protecting society and met any or all of the related goals of deterrence, rehabilitation, or retribution. *State v. Huck*, 119 Idaho 10, 802 P.2d 1222 (Ct. App. 1990).

Defendant's fixed term of two years confine-

ment for delivery of a controlled substance was reasonable in light of the nature of the crimes he committed; the maximum penalty which the district court could have imposed under Idaho law; his character as revealed by his extensive criminal history and the other information contained in his presentence investigation report; and the facts showed that he was a threat to society. *State v. Esparza*, 120 Idaho 578, 817 P.2d 1102 (Ct. App. 1991).

Where the record showed that the court actively considered the nature of the offense and the character of the offender when it imposed the sentence and also showed that the court addressed the appropriate goal of punishment and the related goal of the possibility of rehabilitation, the court did not abuse its discretion when it imposed ten-year determinate terms of confinement, to be followed by indeterminate periods of 15 years, concurrently, for delivery of cocaine charges and also did not abuse its discretion when it denied the motion to reduce the sentences. *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct. App. 1991).

The three-year minimum period of confinement imposed by the trial court did not represent an abuse of discretion where defendant was charged with three counts of delivery of a controlled substance, cocaine, based on three separate and substantial transactions involving a total amount in excess of \$8,000, despite progress reports on the defendant in custody that were quite favorable. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

Where defendant sold heroin on five separate occasions to an undercover officer and simultaneously with his arrest on these charges, he was also arrested on an outstanding federal warrant for illegal entry into the United States and for possessing heroin and cocaine, unified sentences of 20 years in the custody of the Board of Correction with minimum periods of confinement of ten years was reasonable. *State v. Sanchez*, 121 Idaho 124, 822 P.2d 1021 (Ct. App. 1991).

A unified sentence of seven years in the custody of the Board of Correction for delivery of a controlled substance with a minimum period of confinement of three years, to be served concurrently with a sentence defendant was already serving, was reasonable where defendant was on parole at the time she committed the offense, had background and marital problems, and had unfortunately allowed herself to fall into a "vicious cycle" of association with drug dealers and users and abusers of drugs. *State v. Ochoa*, 121 Idaho 536, 826 P.2d 497 (Ct. App. 1992).

A unified sentence of nine years with a minimum period of confinement of two years, for possession of a controlled substance with intent to deliver, was not an abuse of discretion, where although the evidence presented

indicated that defendant's behavior and attitudes were good, and that he was taking advantage of the programs offered at the Idaho State Correctional Institution, the district court decided not to reduce the sentence imposed because of the magnitude and seriousness of the crime. *State v. Brydon*, 121 Idaho 890, 828 P.2d 919 (Ct. App. 1992), overruled on other grounds, *State v. Tranmer*, 21 P.3d 936 (Idaho App. 2001).

Where defendant was sentenced to a unified 25 year sentence, with 12 years fixed, for possession of cocaine with intent to deliver, and a fixed five-year term for possession of marijuana in excess of three ounces to run concurrently with the other sentence, and in addition, the court imposed maximum fines of \$25,000 and \$10,000 respectively, the sentence did not constitute cruel and unusual punishment. *State v. Fairchild*, 121 Idaho 960, 829 P.2d 550 (Ct. App. 1992).

Unified sentences of eight years with minimum periods of confinement of three years on each of two counts of delivery of a controlled substance was not excessive where the primary occupation of the defendant at the time of his arrest was the sale of drugs. *State v. Lamas*, 121 Idaho 1027, 829 P.2d 1376 (Ct. App. 1992).

A unified sentence of six years imprisonment with a minimum period of confinement of three years delivery of heroin was not an abuse of discretion where defendant had only recently immigrated to the United States and the facts in the presentence report indicated that he was involved in an organized drug distribution syndicate. *State v. Pena*, 121 Idaho 1032, 829 P.2d 1381 (Ct. App. 1992).

The judgment of conviction imposing a unified sentence of five years, including a two-year fixed period of confinement for two counts of delivery of hydromorphone, a controlled substance, was affirmed, where defendant was on parole for a similar crime at the time of the instant offense, and at the time of sentencing was a self-admitted drug addict with an extensive criminal record; although defendant had made an agreement with the prosecutor, whereby certain charges were dismissed and the prosecutor agreed to recommend a lesser sentence, the court was not bound by the sentence recommendation made by the state. *State v. Qualls*, 122 Idaho 542, 835 P.2d 1353 (Ct. App. 1992).

Where defendant delivered five ounces, approximately 142 grams, of cocaine to an undercover police officer, a sentence of ten years in the custody of the Board of Correction, including a minimum period of three years' incarceration, was reasonable. *State v. Salgado*, 123 Idaho 247, 846 P.2d 249 (Ct. App. 1993).

Where record did not indicate that district court relied upon unsubstantiated statements

offered by the state, yet did indicate that court properly weighed defendant's previous felony conviction and nature of the instant offense, 10-year sentence, with fixed 2-year term of incarceration, for felony possession of a controlled substance with intent to deliver was not unreasonable and was affirmed. *State v. Vivian*, 129 Idaho 375, 924 P.2d 637 (Ct. App. 1996).

—Forgery.

A unified eight-year sentence, with four years as the minimum period of confinement for forgery, was reasonable where defendant was already on probation in the State of Minnesota and had several prior convictions. *State v. Lowery*, 123 Idaho 983, 855 P.2d 68 (Ct. App. 1993).

—Fraud.

Sentence of five years with a two-year minimum period of confinement for welfare fraud was reasonable, where defendant received food stamps without reporting income received from worker's compensation benefits, and where defendant had a lengthy criminal record. *State v. Baxter*, 124 Idaho 476, 860 P.2d 679 (Ct. App. 1993).

—Injury to a Child.

A unified sentence of three years fixed followed by an indeterminate period of three years for felony injury to a child was not an abuse of discretion where defendant, a mother of four children and late into her third trimester of pregnancy, habitually used cocaine, her son was born addicted to the drug, and, when asked by the investigator why, on the particular day of the infant's death, she failed to feed the baby or to pick him up for approximately a ten-hour span of time, defendant/mother "belligerently answered, 'Well, I just didn't.'"; also, defendant's statements regarding her use of cocaine and the events that transpired surrounding the death of her son varied significantly among the various reports of the investigating officers. *State v. Reyes*, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992).

Unified sentence of twenty years with a ten-year minimum period of confinement for felony injury to a child was not unreasonable, where defendant had been previously found guilty of child abuse of another child, and had a criminal record beginning at age thirteen. *State v. Hassett*, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

—Leaving Scene of Accident.

Where defendant drove his truck into a group of people causing serious injuries including the loss of one victim's arm, and defendant later led police on a high speed chase, a unified sentence of five years with

four years fixed was reasonable for a plea to the charge of leaving the scene of an accident resulting in injury. *State v. Ramirez*, 122 Idaho 830, 839 P.2d 1244 (Ct. App. 1992).

—Life Without Parole.

Where defendant repeatedly raped and battered a drunken woman and then beat her to death with a fire extinguisher, his fixed life sentence without possibility of parole under § 18-4004 and this section for the vicious and unprovoked attack, to which he pled guilty to first degree murder, was not an extreme sentence grossly disproportionate to the crime he committed, and as such, did not constitute the cruel and unusual punishment prohibited by Const., Art. I, § 6. *State v. Schneider*, 126 Idaho 624, 888 P.2d 798 (Ct. App. 1995).

—Multiple Charges.

Where defendant's criminal record spanned ten years, including his juvenile record, a sentence of five years with two years' fixed for first degree burglary, to be served concurrently with an identical sentence previously imposed in a separate case, and a sentence of ten years with three years' fixed for battery with the intent to commit rape, to be served consecutively to the sentence on the first degree burglary conviction were reasonable sentences under the circumstances. *State v. Acha*, 122 Idaho 744, 838 P.2d 873 (Ct. App. 1992).

A fifteen-year determinate sentence for attempted murder and a consecutive 35-year sentence, with fifteen years determinate, for robbery was not excessive, where the character of the offense was vicious and unprovoked, involving infliction of multiple stab wounds on a helpless victim. *State v. Mitchell*, 124 Idaho 374, 859 P.2d 972 (Ct. App. 1993).

Unified sentence of fifteen-year indeterminate term with nine years minimum confinement for burglary and grand theft was reasonable, where defendant had an extensive past history of burglary and theft. *State v. Gawron*, 124 Idaho 625, 862 P.2d 317 (Ct. App. 1993).

—Primary Consideration.

The primary consideration in sentencing is the good order and protection of society; though humanitarian considerations and rehabilitation are important to our society, they cannot be allowed to control or defeat punishment, or to force courts to ignore or subordinate other factors to the detriment of society. *State v. Kern*, 119 Idaho 295, 805 P.2d 501 (Ct. App. 1991).

When imposing sentence in a criminal proceeding, the trial court applies the following criteria: (1) the protection of society; (2) deterrence to the defendant and others; (3) the possibility of rehabilitation; and (4) punish-

ment or retribution. *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995).

—Retention of Jurisdiction.

Where co-defendants convicted of burglary and grand theft, both claimed that the district court abused its discretion by refusing to retain jurisdiction to allow them to obtain rehabilitative treatment for their respective alcohol abuse problems, but where the district court had before it the presentence investigation reports which indicated that both co-defendants had extensive prior criminal records, the court properly concluded that both men would likely fail on any type of probation program and noted the importance of protecting society from them; the court also expressed its concern for both defendants' alcoholism and drug problems and recommended that both defendants be afforded the benefit of the alcohol and drug abuse counseling programs available in the penitentiary, thereby properly considering the relevant sentencing factors, and indicating no abuse of discretion in refusing to retain jurisdiction. *State v. Smith*, 119 Idaho 233, 804 P.2d 1364 (Ct. App. 1991).

—Robbery.

Three concurrent sentences of 15 years to life for robbery was reasonable where the violent robberies constituted defendant's sixth, seventh, and eighth felony convictions as an adult. *State v. Dunn*, 123 Idaho 245, 846 P.2d 247 (Ct. App. 1993).

In prosecution for 10 counts of robbery, concurrent sentences of 25 years to life were not excessive under any reasonable view of the facts where defendant had committed robberies of two churches in different counties on the same day, and where defendant had been convicted of five previous felonies and his presentence investigation (PSI) showed a host of other charges which were dismissed or for which the disposition was unknown, where he had been placed on probation, unsuccessfully, and had been placed in prison and granted parole, all of which did not have the effect of deterring him from future crimes. *State v. Hyde*, 127 Idaho 140, 898 P.2d 71 (Ct. App. 1995).

—Sex Offenses.

Court's sentence was not excessive and did not overemphasize protecting society or inadequately consider treatment alternatives where the defendant had a pattern of sexually deviant behavior, and the instant offenses occurred while the defendant was on probation and undergoing court-ordered therapy. *State v. Peltier*, 119 Idaho 14, 803 P.2d 202 (Ct. App. 1990).

A unified sentence of ten years in the custody of the Board of Correction with a mini-

mum period of confinement of 30 months for lewd conduct with a child under the age of 16 was not unreasonable, where defendant pled guilty to a charge that he had engaged in sexual activity with his daughter, age 15, and had been molesting her, including sexual intercourse, since she was seven years old. *State v. Nelson*, 121 Idaho 141, 823 P.2d 175 (Ct. App. 1991).

Where defendant, an orderly in a nursing home, was convicted of raping a 77 year-old woman diagnosed as suffering from Alzheimer's disease and defendant stated he saw nothing wrong with his actions, a unified sentence of life with a minimum period of confinement of ten years, was not an abuse of discretion. *State v. Grove*, 120 Idaho 950, 821 P.2d 1005 (Ct. App. 1991).

Where defendant picked up a five-year old boy while he was walking to kindergarten and transported him to a remote area in his pickup truck, slapped the boy, took off all of the boy's clothes and touched him by his legs in a place the boy described as "nasty," a life term with a minimum period of confinement of 15 years was not an abuse of discretion. *State v. Estes*, 120 Idaho 953, 821 P.2d 1008 (Ct. App. 1991).

A unified sentence of eight years in the custody of the Board of Correction, with a minimum period of confinement of forty-two months for rape was reasonable where the victim was a fifteen-year-old girl that defendant had met at a party and defendant's prior record consisted of some misdemeanor charges, two DUIs and a reckless driving charge. *State v. Anderson*, 121 Idaho 534, 826 P.2d 495 (Ct. App. 1992).

Where defendant indicated that if the opportunity arose again to become involved with a teenage girl, defendant would feel no compunction about pursuing such an activity and, in the future, his aggressive nature might result in a crime of greater violence, and defendant had a history of other criminal acts, a sentence of seven years determinate followed by an additional indeterminate seven year period, for lewd and lascivious conduct with a minor under the age of sixteen, was not an abuse of discretion. *State v. Puente-Gomez*, 121 Idaho 702, 827 P.2d 715 (Ct. App. 1992).

A unified sentence of ten years with a minimum period of confinement of three years for sexual abuse of a child under the age of 16 was not an abuse of discretion where: (1) defendant was charged with engaging in sexual activity with his stepdaughter, age 13, by fondling her breasts while she was sleeping; (2) this case was not defendant's first involvement with the criminal justice system; (3) in 1980 he purportedly engaged in sexual intercourse with another teen-aged stepdaughter

but formal charges were not filed; and (4) defendant had been married six times and five of these marriages were to teenage females. *State v. Patterson*, 121 Idaho 789, 828 P.2d 352 (Ct. App. 1992).

Where defendant did not have an extensive prior criminal record, but had engaged in sexual abuse of his daughter over a long period of time, a sentence of 15 years' imprisonment with a four-year minimum period of confinement was not an abuse of discretion and sentence was reasonable. *State v. Kingston*, 121 Idaho 879, 828 P.2d 908 (Ct. App. 1992).

A unified sentence of ten years in the custody of the Board of Correction with a minimum period of confinement of five years for lewd conduct with a minor under the age of 16 was reasonable where defendant was charged with four counts of lewd conduct with a minor, allegedly occurring over a five-month period, and involving two of his nieces between the ages of eight and ten years old and pursuant to a plea bargain, the State agreed to dismiss three of the counts in exchange for defendant's plea of guilty to the remaining count. *State v. Rosa*, 121 Idaho 982, 829 P.2d 872 (Ct. App. 1992).

Defendant's sentences of a three year minimum period of confinement for lewd conduct with a minor child, and of three years minimum confinement for first-degree burglary, to be served concurrently, were not an abuse of discretion; defendant was on probation for grand theft and forgery convictions and presentence investigation revealed prior lewd and lascivious conduct with children. *State v. Harris*, 122 Idaho 216, 832 P.2d 1151 (Ct. App. 1992).

A unified sentence of 15 years in the custody of the Board of Correction, with a minimum period of confinement of five years for lewd conduct with a minor was not unreasonable, where defendant had previously been convicted on one count of assault, one count of malicious injury to property, had had his driving privileges suspended and had used marijuana and cocaine, although he had not had other sexual incidents with minors. *State v. Fullerton*, 122 Idaho 319, 834 P.2d 321 (Ct. App. 1992).

The trial court did not abuse its discretion in imposing a 15-year to life sentence for conviction of lewd conduct with a minor, and a concurrent indeterminate sentence of 20 years for another conviction of lewd conduct with a minor where defendant had a long history of homosexual pedophilia and defendant denied he had a sexual abuse problem. *State v. Wavrick*, 123 Idaho 83, 844 P.2d 712 (Ct. App. 1992).

Although defendant's prior criminal record consisted of only a few convictions for minor crimes and traffic offenses, since the crime

consisted of a violent, forced sexual act, there was no abuse of discretion by the district court in arriving at the two-year term of a sentence of a five-year indeterminate term of incarceration with a two-year minimum period of confinement. *State v. Birkla*, 126 Idaho 498, 887 P.2d 43 (1994).

Sentence of eight years with a minimum period of confinement of three years for defendant convicted of sexual battery of a minor child 16 or 17 years old was not excessive nor an abuse of trial court's discretion, where the minor had been placed in defendant's home as a foster child. Although defendant had no prior criminal record, had an excellent work history, and had the continued support of his wife, family and church, since the reason for the minor's placement was her allegations of sexual abuse perpetrated on her by her father, and once in the defendant's home there were approximately five acts of sexual battery over a three-month period which included acts of unprotected intercourse and the minor became pregnant, and while there was support in the record for the defendant's claim that the sexual intercourse was consensual, defendant's abuse of his position of trust as a foster parent to a troubled adolescent was a very serious aggravating factor. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct. App. 1994).

Sentencing a defendant convicted of three counts of lewd conduct with a minor to three concurrent indeterminate sentences of twenty years with a fixed ten-year sentence under the Unified Sentencing Act was not an abuse of discretion because defendant had no prior felony conviction, had good employment history, the fact that the offenses for which he was convicted did not involve violence, and the availability of probation with comprehensive terms as an alternative sentence, where evidence was presented showing that defendant had previously molested both his daughter and step-daughter, and a psychological evaluation of defendant prepared as part of the pre-sentence investigation concluded that he was at risk to offend again. *State v. Labelle*, 126 Idaho 564, 887 P.2d 1071 (1994).

Unified life sentence with a minimum term of ten years' confinement for lewd and lascivious conduct with a minor conviction and a determinate sentence of five years for sexual abuse of a minor conviction were not unreasonable and were affirmed where evidence showed an undue risk that defendant would commit other, similar crimes and lesser sentences would depreciate the seriousness of the crimes. *State v. Roberts*, 129 Idaho 325, 924 P.2d 226 (Ct. App. 1995). See also *State v. Roberts*, 129 Idaho 194, 923 P.2d 439 (1996), cert. denied, 519 U.S. 1118, 117 S. Ct. 964, 136 L. Ed. 2d 849 (1997).

—Theft.

Where defendant received two concurrent unified ten-year sentences, each with a five-

year minimum term of confinement for grand theft by false promise involving over 24 victims, the sentence was not an abuse of discretion. *State v. Bianchi*, 121 Idaho 766, 828 P.2d 329 (Ct. App. 1992).

For grand theft, a sentence of five years with a minimum confinement period of two years was reasonable, where defendant was involved in a "scam" which conned victims into paying for nonfunctional pay phones, and where defendant had a prior record and a history of being a fugitive from justice in other jurisdictions. *State v. Johnston*, 123 Idaho 222, 846 P.2d 224 (Ct. App. 1993).

Defendant's sentences for grand theft were not unjust because his codefendants received "lesser" sentences where defendant had a prior felony record while his codefendants did not. *State v. Westmoreland*, 123 Idaho 980, 855 P.2d 65 (Ct. App. 1993).

Unified fourteen-year sentence, with four years minimum confinement for grand theft charges was reasonable, where defendant had a considerable criminal record including prior convictions for assault and rape. *State v. Whitcher*, 124 Idaho 478, 860 P.2d 681 (Ct. App. 1993).

Proportionality Challenge.

A proportionality challenge to a sentence is inapplicable to other than death penalty cases, and the claim of defendants convicted of misdemeanor battery and sentenced to jail time, fines and probation that the sentences are out of proportion to the gravity of the offense committed were rejected. *State v. Donohoe*, 126 Idaho 989, 895 P.2d 590 (Ct. App. 1995).

Purpose.

Where a sentence is within statutory limits it will not be disturbed unless clear abuse of discretion is shown; such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. A sentence is reasonable to the extent it appears necessary, at the time of the sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

Prior to the enactment of the Unified Sentencing Act, the policy of the Commission of Pardons and Parole allowed for consideration for parole of certain, qualifying individuals who had served one-third of their indeterminate sentences; however, this section has displaced that policy because it gives the sentencing judge the power to determine the length of time to be served in confinement before parole eligibility. *State v. Knight*, 114 Idaho 923, 762 P.2d 836 (Ct. App. 1988).

Reasonableness.

A sentence is reasonable if it accomplishes the primary objective of protecting society and meets any or all of the related goals of deterrence, rehabilitation, or retribution. The reasonableness of the sentence must be considered in light of the nature of the offense and the character of the offender. *State v. Anderson*, 119 Idaho 204, 804 P.2d 933 (Ct. App. 1990).

Several factors are relevant in deciding whether a particular sentence is reasonable. The primary consideration in sentencing is the good order and protection of society; though humanitarian considerations and rehabilitation are important to society, they cannot be allowed to control or defeat punishment, or to force courts to ignore or subordinate other factors to the detriment of society. *State v. Young*, 119 Idaho 430, 807 P.2d 648 (Ct. App. 1991).

The reasonableness of a sentence is determined by focusing on the probable length of confinement, which, under this section, is the minimum period of incarceration imposed by the sentencing judge. *State v. Wildcat*, 123 Idaho 514, 849 P.2d 975 (Ct. App. 1993).

—Fixed Life Sentence.

Even a fixed life sentence may be deemed reasonable if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society. *State v. Anderson*, 119 Idaho 204, 804 P.2d 933 (Ct. App. 1990).

Recommendation by State.

A trial court is not bound by a sentence recommendation made by the state even though that recommendation was offered in conjunction with a negotiated plea; the state's recommendation to the trial court is purely advisory. Accordingly, the trial court did not err in sentencing the defendant to an indeterminate 30-year term for robbery even though the state had only recommended that a 15-year indeterminate sentence be imposed. *State v. Rossi*, 105 Idaho 681, 672 P.2d 249 (Ct. App. 1983).

Reinstatement of Sentence.

Reinstatement of defendant's two-year sentence for grand theft was not unreasonable where defendant had a long prior record, and had previously absconded from parole in Oregon. *State v. New*, 123 Idaho 168, 845 P.2d 586 (Ct. App. 1993).

Review of Sentence.

When evaluating a sentence imposed under the Unified Sentencing Act (this section), the minimum fixed period generally will be treated as the probable measure of confine-

ment for the purpose of sentence review. *State v. Young*, 119 Idaho 510, 808 P.2d 429 (Ct. App. 1991).

In reviewing a sentence imposed under the Unified Sentencing Act, the minimum period specified by the sentencing judge is treated as the probable duration of confinement. *State v. Beatey*, 123 Idaho 273, 846 P.2d 924 (Ct. App. 1993).

Where defendant argued that the minimum period of confinement under this section for his conviction for lewd conduct with a minor of less than sixteen years of age under § 18-1508 was an abuse of discretion, he must establish his claim that it was an abuse of discretion in light of any reasonable view of the facts. *State v. Bjorklund*, 126 Idaho 656, 889 P.2d 90 (Ct. App. 1994).

In light of the fact that alcohol treatment had, thus far, been unavailing and that defendant's criminal behavior existed prior to his indulgence in alcohol, the minimum period of confinement imposed by the defendant's sentences was not improper and did not constitute an abuse of discretion. *State v. Cagle*, 126 Idaho 794, 891 P.2d 1054 (Ct. App. 1995).

The Idaho Supreme Court's general objectives when reviewing a trial court's sentencing are to correct a sentence which is excessive in length, to facilitate the rehabilitation of the offender, to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process, and to promote criteria for sentencing which are both rational and just. *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995).

Robbery.

Although § 18-6503 provides that the minimum sentence for robbery is five years, the minimum period of confinement under the sentence, pursuant to this section, may be for a term less than five years. *State v. Haggard*, 116 Idaho 276, 775 P.2d 168 (Ct. App. 1989).

Statutory Provisions.

Provision of § 18-6104 providing for sentence of not less than one year, and that imprisonment may be extended to life at the

discretion of the court does not conflict with this section, which provides that court in imposing sentence for commission of a felony shall sentence offender for an indeterminate period of time, but fixing in such sentence the maximum period of imprisonment. *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951).

—Section 37-2739B.

The district court was correct in denying defendant's motion to reduce his sentence under I.C.R. 35 because the sentence was disproportionate and that it was improper to seek a fixed penalty under § 37-2739B(c) without proper notice, on the grounds that defendant was not given an enhanced sentence under § 37-2739B, but was sentenced under this section which allows the court to specify a minimum period of confinement within the maximum period of confinement provided for the offense of conviction. *State v. Killinger*, 126 Idaho 737, 890 P.2d 323 (1995), (decision prior to repeal).

Opinions of Attorney General. The Commission for Pardons and Parole may schedule an initial parole hearing prior to the expiration of an inmate's determinate sentence so that the inmate may be paroled on the date he becomes eligible for parole. OAG 91-8.

When two sentences are ordered to be served consecutively, and when they both contain fixed and indeterminate terms, the fixed sentences must be served first, one after the other. Then, the parole commission shall determine when and if parole will be granted at any time during the pendency of the consecutive indeterminate terms in a single proceeding. OAG 92-1.

The Commission of Pardons and Parole may commute an indeterminate sentence to a lesser fixed term for the purpose of complying with the Prisoner Transfer Treaty between the United States and Mexico. OAG 93-3.

The Idaho Commission for Pardons and Parole does have the power to commute a sentence during a fixed term under the Unified Sentencing Act. OAG 94-3.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Abuse of discretion.
Burden of proof.
Failure to surrender.
Maximum permissible sentence.
Sentence proper.

Abuse of Discretion.

Trial court did not abuse its discretion in sentencing defendant, who was a transient passing through Idaho when he committed the crime, to an indeterminate term not to

exceed three years for possession of forged check since court considered likelihood of rehabilitation, the seriousness of the crime and defendant's prior involvement in similar activities. *State v. Delin*, 102 Idaho 151, 627 P.2d 330 (1981).

Where a sentence is within statutory limits it will not be disturbed unless clear abuse of discretion is shown; such an abuse of discretion may be found if the sentence imposed is shown to be unreasonable upon the facts of the case. A sentence is reasonable to the

extent it appears necessary, at the time of the sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case. *State v. Wolfe*, 107 Idaho 676, 691 P.2d 1291 (Ct. App. 1984).

The court did not abuse its discretion in giving an indeterminate 14-year sentence to a grand theft defendant where defendant had a long history of crime, had been given many opportunities for rehabilitation which had been of little avail, and, while awaiting trial, had tested positive for marijuana use. This prior history and drug use problem warranted incarceration for the protection of society. *State v. Ramsey*, 115 Idaho 717, 769 P.2d 594 (Ct. App. 1989).

Burden of Proof.

A punishment set by a duly elected legislature is presumed to be valid so long as the penalty is not cruelly inhumane or disproportionate to the crime involved and a heavy burden rests on those who challenge the presumed validity of a punishment. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

Failure to Surrender.

Where defendant was sentenced to an indeterminate term not to exceed three years on April 29, and was given until May 3, to surrender and commence serving his sentence, but where defendant did not surrender on May 3, and a bench warrant was issued for his arrest, the district court had jurisdiction to withdraw defendant's original sentence and resentence him to a fixed term of five years. *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980).

Maximum Permissible Sentence.

Where the evidence indicated that the defendant and two others stole a pickup truck

and tools and drove to a remote mining cabin which they vandalized, that they destroyed the pickup and stole some blasting materials with which they attempted to destroy some trees, and that the total damage exceeded \$12,000, the sentencing court properly imposed a sentence of an indeterminate period not to exceed five years; even though the defendant was given the maximum number of years under § 18-7001, he was not given the maximum permissible sentence, because this section, when applied in conjunction with § 18-7001, would permit the indeterminate court to impose a fixed term sentence of up to five years and, thus, the trial court did not abuse its discretion by failing to grant the defendant either probation, a 120-day rider or a lesser sentence. *State v. West*, 102 Idaho 562, 633 P.2d 1140 (1981).

Where the defendant, in a state of extreme frustration, jealousy, and inebriation, entered a saloon and shot his wife three times thereby killing her, a sentence of an indeterminate prison term of not to exceed life imprisonment was not excessive, despite the defendant's exemplary military service record and evidence showing him to be a good husband and father, considering the particularly heinous nature of the murder and the public interest in retribution. *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982).

Sentence Proper.

Where intentional, senseless killing justified long-term confinement in retribution for the irretrievable loss that defendant had caused and defendant's history of behavioral and drug-related problems showed that rehabilitation would be a problematic task, sentence of fixed term of 25 years, imposed in second-degree murder case, was not excessive. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct. App. 1983).

19-2513A. Alternative fixed term sentence. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 19-2513A, as added by

1977, ch. 243, § 1, p. 720, was repealed by S.L. 1986, ch. 232, § 4.

19-2514. Persistent violator — Sentence on third conviction for felony. — Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life. [C.S., § 9035A, as added by 1923, ch. 109, § 1, p. 139; I.C.A., § 19-2414; am. 1970, ch. 143, § 2, p. 425.]

Compiler's notes. Section 3 of S.L. 1970, ch. 143 was repealed, and § 4 is compiled as § 19-2604.

Sec. to sec. ref. This section is referred to in § 19-5004.

Cited in: *State v. Cliett*, 96 Idaho 646, 534 P.2d 476 (1975); *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981); *State v. Angel*, 103 Idaho 624, 651 P.2d 558 (Ct. App. 1982); *Maxfield v. Thomas*, 557 F. Supp. 1123 (D. Idaho 1983); *State v. Stoddard*, 105 Idaho 169, 667 P.2d 272 (Ct. App. 1983); *Russell v. State*, 105 Idaho 490, 670 P.2d 904 (Ct. App. 1983); *State v. Heistand*, 107 Idaho 218, 687 P.2d 1001 (Ct. App. 1984); *Maxfield v. State*, 108 Idaho 493, 700 P.2d 115 (Ct. App. 1985); *State v. Stedtfeld*, 108 Idaho 695, 701 P.2d 315 (Ct. App. 1985); *Stone v. State*, 108 Idaho 822, 702 P.2d 860 (Ct. App. 1985); *State v. Currington*, 113 Idaho 538, 746 P.2d 997 (Ct. App. 1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988); *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989); *State v. Hildreth*, 120 Idaho 573, 817 P.2d 1097 (Ct. App. 1991); *Huck v. State*, 124 Idaho 155, 857 P.2d 634 (1993); *State v. Gomez*, 126 Idaho 700, 889 P.2d 729 (Ct. App. 1995); *State v. Medina*, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); *State v. Oar*, 129 Idaho 337, 924 P.2d 599 (1996); *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

ANALYSIS

Apportionment of sentence.
Construction.
Correction.
Discretion of court.
Double jeopardy.
Enhancement.
Equal protection.
Evidence.
Felony escape.
Fixed term.
Good or bad conduct.
Informing jury of felony charge.
In general.
Judgment.
—Correction.
Length of sentence.
Notice.
Persistent violator charge improper.
Persistent violator charge proper.
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Apportionment of Sentence.

Trial court did not err when it sentenced defendant and declined to apportion any explicitly specified period of the sentence to the jury's finding that defendant was a persistent violator. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Construction.

The persistent violator law does not create or define a new or independent crime; rather, it renders a person convicted liable to perform in excess of that which might have been inflicted upon him had he not been twice previously convicted. *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963).

The argument that § 19-2514 imposes a mandatory sentence by analogy to this section was rejected by the appellate court, since statutory amendment by implication is disfavored and the state submitted no evidence of legislative support for such amendment. *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).

Correction.

Where sentencing provisions are clearly interdependent, if sentence on one provision is unlawful, the entire sentence is unlawful and may be amended. *State v. Lopez*, 107 Idaho 826, 693 P.2d 472 (Ct. App. 1984).

Where the sentencing court illegally imposed a sentence separately for the persistent violator status and the underlying felony the entire sentence was unlawful and the court must correct the sentence by deleting the illegal separate sentence and amending the lawful provision. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

Discretion of Court.

Where defendant was found guilty of the crime of arson in the second degree and admitted having been convicted of previous felonies, trial court's sentence of fifteen years, following a pre-sentence investigation and a hearing in mitigation of sentence, was not an abuse of discretion. *State v. Johnson*, 96 Idaho 727, 536 P.2d 295 (1975).

In view of defendant's status as a persistent violator, which allowed for enhancement of sentences imposed for other crimes, and his conviction for robbery, which was itself punishable by incarceration for life, and where presentence reports demonstrated defendant's anti-social and unstable behavior, trial court did not abuse discretion in imposing indeterminate life sentence. Nor would such sentence be reduced on appeal despite defendant's claim of “diminished responsibility”

demonstrated by a history of self-mutilation. *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

Where defendant had prior convictions of burglary, grand larceny, drug selling and drug distributing, repeated parole violations and charges without disposition of shoplifting, larceny and burglary, imposition of 12-year indeterminate sentence was well within the limits of this section and did not constitute an abuse of discretion. *State v. McPhie*, 104 Idaho 652, 662 P.2d 233 (1983).

Where defendant was found guilty of first-degree burglary and of being a persistent offender, sentence of a determinate term of ten years in prison was well within the confines of the sentencing options available to the trial court and there was no abuse of discretion on the part of the trial judge. *State v. Sena*, 106 Idaho 25, 674 P.2d 454 (Ct. App. 1983).

Where the presentence report in a robbery prosecution showed that the defendant had compiled an exceptionally long prior record, the district court did not abuse its discretion in sentencing the defendant to an indeterminate, 30-year period of custody on the robbery charge and as a persistent violator. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

The district court did not abuse its discretion in sentencing defendant to an indeterminate term not to exceed 19 years where defendant had three prior felony convictions and a number of misdemeanors over a ten-year period. *State v. Darbin*, 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

Trial court did not abuse its discretion in sentencing defendant to a sentence that included a fixed imprisonment term of five years where defendant was charged with delivery of heroin and with being a persistent violator, despite defendant's contention that the court did not give adequate consideration to his drug addiction. *State v. Zamora*, 129 Idaho 817, 933 P.2d 106 (1997).

Based upon the seriousness of the offense, the evidence of defendant's character, and the danger of reoffense that he presented, the sentence and fine of a unified life sentence with a seven and one-half year determinate term of incarceration and a \$50,000 fine, was not an abuse of the district court's sentencing discretion. *State v. Wilhelm*, 135 Idaho 111, 15 P.3d 824 (Ct. App. 2000).

Double Jeopardy.

In a second persistent violator prosecution which relied on offenses utilized to sustain a first persistent violator charge, court held that the second use of a prior conviction to establish a persistent violator charge did not constitute double jeopardy. *State v. Salazar*, 95 Idaho 650, 516 P.2d 707 (1973).

Enhancement.

An enhancement is not an offense; an enhancement should be added to the information containing the underlying criminal charges. *State v. Lopez*, 107 Idaho 826, 693 P.2d 472 (Ct. App. 1984).

An enhancement under this section does not create a new crime, but instead provides for the imposition of greater punishment for the underlying conviction; thus a separate sentence should not be imposed for an enhancement under this section. *State v. Lopez*, 107 Idaho 826, 693 P.2d 472 (Ct. App. 1984).

Equal Protection.

This section does not violate the equal protection clause. *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977).

Evidence.

Defendant's identification as the person convicted of one of two previous felonies of which he was alleged to have been convicted by a photocopy of fingerprint records authenticated by one not shown to have the custody of the original records was insufficient to convict him of being a persistent violator. *State v. Polson*, 92 Idaho 615, 448 P.2d 229 (1968), cert. denied, 395 U.S. 977, 89 S. Ct. 2129, 23 L. Ed. 2d 765 (1969).

Felony Escape.

A unified sentence of 13 years in the custody of the Board of Corrections with a three year minimum period of confinement was not excessive for a conviction of felony escape with persistent violator enhancement, even though defendant had not been convicted of a violent crime and the county sheriff had testified as to improvement in defendant's conduct while in custody. *State v. Holton*, 120 Idaho 112, 813 P.2d 923 (Ct. App. 1991).

Fixed Term.

While § 19-2513A (repealed) authorizes a fixed sentence as an alternative for any person convicted of a "felony" a defendant found to be a persistent violator can be sentenced to a fixed term. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

Good or Bad Conduct.

The underlying principal of this section is that previous good or bad conduct should be considered in determining punishment for a crime. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Informing Jury of Felony Charge.

Although in a driving under the influence (DUI) case where the charge is enhanced to a felony under § 18-8005 due to the existence of prior convictions, the jury should not be informed during the first phase of the trial that

the defendant is charged with a felony, and although the district judge erred in using the terms "felony" and "feloniously" in the jury instructions, because the jury was admonished not to speculate as to punishment and the State presented overwhelming evidence that defendant committed the offense charged, there was no reasonable possibility that such error contributed to the conviction and conviction was upheld. *State v. Roy*, 127 Idaho 228, 899 P.2d 441 (1995).

In General.

Under this section, where defendant has three previous convictions for felony and present prosecution, if convicted, would be the fourth, such defendant, if convicted, would be a persistent violator. *State v. Bates*, 63 Idaho 119, 117 P.2d 281 (1941).

Third conviction of felony does not constitute a crime but renders person so convicted liable to punishment in excess of that which might have been imposed but for the two previous convictions. In re *Bates*, 63 Idaho 748, 125 P.2d 1017 (1942).

In prosecution of recidivist, it is immaterial whether previous convictions were within or without the state, whether previous crimes were committed within or without the state, or whether such offenses would have been felonies if committed within the state, if it was a felony under the laws of the state where the conviction occurred. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942).

The court did not agree with the contention of the appellant that the wording of the information charging appellant with the crime of "forgery and being a persistent violator" did not charge the appellant with the commission of two crimes or on the other hand fail to specify a crime. *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963).

An information in two counts, the first charging arson in the first degree and the second reiterating the charge and also alleging the defendant to be a persistent violator, did not charge two offenses. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

This section does not deal with the commission of criminal offenses as such, but deals only with the status of an accused after he has been found guilty of the offense for which he is tried and renders him liable to punishment in excess of that which might have been inflicted upon him if he had not been twice previously convicted. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

This section does not create a new crime, but merely provides for greater punishment, for the latest conviction, than that which might have been inflicted had there not been two prior convictions. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969); *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977); *State v. Lloyd*,

104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

The language of this section plainly imputes a policy of measuring a defendant's conduct against the standards prescribed by the laws of the state where each prior offense was committed. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

This section does not create a new crime, but merely provides for greater punishment for the latest conviction than that which might have been inflicted had there not been two prior convictions. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

A punishment set by a duly elected legislature is presumed to be valid so long as the penalty is not cruelly inhumane or disproportionate to the crime involved and a heavy burden rests on those who challenge the presumed validity of a punishment. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

Judgment.

—Correction.

Where a trial court's judgment after referring both to the "armed robbery" and to persistent violator status, contained a technical error in that it sentenced the defendant to custody of the Board of Correction for two concurrent, indeterminate periods not exceeding 30 years "on each count," the judgment had to be corrected to state that the defendant, having been adjudicated a persistent violator, was given a single 30-year indeterminate sentence for the robbery. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Length of Sentence.

Where defendant was convicted of possessing approximately nine pounds of marijuana with intent to deliver, and was sentenced as a persistent violator to 30 years with a 15-year minimum term of confinement, and the sentencing judge, in sentencing defendant, wanted to send a "message" to drug traffickers, to law enforcement officers and to the public, as well as wanting to protect society, such "message" sentences must be tailored to the facts at hand, and the goals of protecting society; sending a "message" in this case where defendant's prior record involved a long history of criminal offenses, but no violent crimes and no activities in controlled substances other than marijuana, did not require a minimum period of incarceration exceeding ten years. *State v. Gauna*, 117 Idaho 83, 785 P.2d 647 (Ct. App. 1989).

Sentencing judge was within his discretion where he sentenced a defendant convicted of two counts of first degree burglary and a

batter with intent to commit rape, to 25 years, with ten years indeterminate following a minimum period of confinement of 15 years on each of the three felony counts; ordinarily, each felony would carry a maximum penalty of not more than 15 years, however, because the jury found that the defendant was a persistent violator, the maximum permissible sentence for each of the felonies was extended to imprisonment for life. *State v. Haggard*, 119 Idaho 664, 809 P.2d 525 (Ct. App. 1991).

Notice.

This section does not require notice that the state is seeking an enhanced sentence be given a defendant at or before the preliminary hearing; it requires notice only through an allegation in the information filed in district court. *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988), cert. denied, 490 U.S. 1070, 109 S. Ct. 2076, 104 L. Ed. 2d 640 (1989).

Persistent Violator Charge Improper.

Where the defendant was charged with all three prior felonies in the same information on the same day, where there was no evidence that time elapsed between the crimes, and where there was no evidence that the crimes were committed in different locations, the evidence presented did not prove that the defendant had time to reform his actions between crimes, and the district court erred when it submitted the persistent violator issue to the jury. *State v. Clark*, 132 Idaho 337, 971 P.2d 1161 (Ct. App. 1998).

Persistent Violator Charge Proper.

Where three offenses were charged in three separate informations and each charge represented a separate crime occurring in a separate location with a separate victim, but the three convictions were imposed on the same day because of a plea bargain agreement that resulted in some charges being dismissed, one of which happened to be a persistent violator charge, there was no error in finding the defendant to be a persistent violator under this section. *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

I.C.R. Rule 11 requires that the defendant be informed of direct consequences of a guilty plea, not collateral consequences; the future possibility of persistent violator status is a collateral, rather than direct, consequence of a guilty plea. *Carter v. State*, 116 Idaho 468, 776 P.2d 830 (Ct. App. 1989).

Persistent violator enhancement, because of a conviction in California, was upheld where the question of whether the crime is a felony or misdemeanor is answered by the type of sentence that is imposed, and the documents offered by the state clearly showed the conviction to be a felony. *State v. Pacheco*, 134 Idaho 367, 2 P.3d 752 (Ct. App. 2000).

Defendant convicted of seven counts of burglary and one count of grand theft was properly sentenced as a persistent violator under Idaho Code § 19-2514. He had a long history of criminal behavior: his juvenile record included batteries, arson and malicious injury to property; as an adult, he had been convicted of two felonies and several misdemeanors. *State v. Dixon*, — Idaho —, — P.3d —, 2004 Ida. App. LEXIS 27 (Ct. App. Mar. 5, 2004).

Plea of Guilty.

Where the indictment alleged that defendant had previously been convicted of two felonies, the indictment stated sufficient facts to support the allegation that he was a persistent violator, meeting the jurisdictional requirements, and because defendant entered a valid guilty plea, the state was relieved of its burden of proving the requisite elements. *State v. Wilhelm*, 135 Idaho 111, 15 P.3d 824 (Ct. App. 2000).

—Threat of Enhanced Sentence.

The district court did not err when it concluded that defendant voluntarily pled guilty to a charge of aggravated assault upon a law enforcement officer where defendant entered his plea to avoid the prosecutor's threat of an enhanced sentence and where the prosecutor's threat was allegedly mentioned for the first time during the hearing at which defendant was to enter his plea. *State v. Storm*, 123 Idaho 228, 846 P.2d 230 (Ct. App. 1993).

Pleading Priors.

Priors relied on must be alleged and proven and the identity of accused as the person convicted must be established beyond reasonable doubt. *State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132 (1939).

Where after plea of guilty to charge of burglary and not guilty to being persistent violator, information was amended so as to omit charge of persistent violator, court had no authority to sentence defendant as a recidivist. *State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132 (1939).

An information charging grand larceny was required also to charge persistent violation before the judge was authorized to pronounce sentence therefor. In *re Bates*, 63 Idaho 748, 125 P.2d 1017 (1942).

The former convictions relied upon to invoke this section must be alleged in the indictment or information and proved at trial, and the identity of the person formerly convicted must be established beyond a reasonable doubt. *State v. Martinez*, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982).

A defendant may not collaterally attack a prior conviction for ineffective assistance of counsel in that prior proceeding for purposes of defending against a subsequent persistent

violator enhancement under Idaho Code § 19-2514. *State v. Warren*, 135 Idaho 836, 25 P.3d 859 (Ct. App. 2001).

Prejudicial Error.

Where the district court erred in submitting a persistent violator issue to the jury, and where the court was silent in its sentencing statement as to what weight, if any, it gave the persistent violator finding, it could not be stated beyond a reasonable doubt that a sentence of thirty years would have been imposed had the finding not been made, and the error required reversal of the finding and remand for resentencing. *State v. Clark*, 132 Idaho 337, 971 P.2d 1161 (Ct. App. 1998).

Preliminary Examination.

Magistrate's order, that accused charged with grand larceny and being a persistent violator, be held to answer as persistent violator instead of grand larceny of which he was accused in amended complaint and information, was error. In re *Bates*, 63 Idaho 748, 125 P.2d 1017 (1942).

Previous Felony Convictions.

When the court pursuant to plea of guilty or verdict of a jury, adjudges the defendant guilty of burglary, he has been convicted of a felony within the meaning of this section and § 18-111. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

The test to be applied as to whether a crime is a felony or a misdemeanor, where no alternate sentence is provided by law, is the punishment that may or should be inflicted and not that actually imposed. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

This section requires that the prior convictions, upon which persistent violator status is asserted, must be for felonies under the laws of the state where the conviction was entered. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Where a person is convicted of a felony and is also adjudged to be a persistent violator of the law there is only one conviction and only one sentence can be imposed; however, the sentence of a persistent violator can be greater than what the statutes otherwise would have permitted for the particular felony; the sentence may be imprisonment for life. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

Convictions entered the same day or charged in the same information should count as a single conviction for purposes of establishing habitual offender status; however, the nature of the convictions in any given situation must be examined to make certain that the general rule is appropriate. *State v.*

Brandt, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

For purposes of this section, a conviction occurs when a defendant pleads guilty and the plea is accepted by the court; thus, a previous felony conviction under this section arises upon a determination of guilt, whether it be by a defendant's own admission or as the result of a jury verdict. *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

Unified sentence of twenty years with a ten-year minimum period of confinement for felony injury to a child was not unreasonable, where defendant had been previously found guilty of child abuse of another child, and had a criminal record beginning at age thirteen. *State v. Hassett*, 124 Idaho 357, 859 P.2d 955 (Ct. App. 1993).

The district court did not err in treating the defendant's two felony convictions as one for purposes of sentencing enhancement under this section where the convictions were for robbing the same store over a period of ten days and where, although separate indictments were filed, the cases had consecutive case numbers and identical sentences was entered on the same day by the same judge. *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).

The persistent violator statute was applicable where defendant's two prior felony convictions were unrelated crimes that were committed on different dates in different counties and did not qualify for treatment as a single conviction under the exception set out in *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1985). *State v. Mace*, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000).

District court properly declined to treat defendant's four prior felony convictions as a single conviction for purposes of Idaho Code § 19-2514; although all four convictions were entered on the same day, the crimes were committed on separate dates against separate victims. *State v. Self*, — Idaho —, 85 P.3d 1117 (Ct. App. 2003).

Procedure.

Procedure as set forth in *State v. Ferrone*, 96 Conn. 160, 113 A. 452, is adopted by the court that in charging an accused with being a persistent violator, the procedure should be divided into two parts, the first part setting forth the particular offense with which the accused is charged being on the first page of the information and signed by the prosecuting officers, and in the second part former convictions should be alleged but this second part should be separable from the first page and also signed by the prosecuting officer. While the entire information should be read the accused, the jury is read only the first part of the information setting forth the crime for which trial is to be had, and after the jury

returns a verdict of guilty then the second part in which the other convictions are alleged should be read to them and they should be charged to inquire on that issue. *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963); *State v. Wiggins*, 96 Idaho 766, 536 P.2d 1116 (1975).

Although the State must allege persistent violator status in the prosecutor's information, the allegation is not read to the jury unless the defendant is found guilty of the crime(s) charged. *State v. Smith*, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989).

Because defense counsel's stipulation, standing alone, was insufficient to waive defendant's right to a trial on a persistent violator allegation, the court vacated defendant's enhanced sentence and remanded for a determination of whether defendant was a persistent violator; although the court did not deem a full Boykin litany to be necessary, it held that a stipulation to the truth of a persistent violator allegation would be valid only if the record showed that defendant entered into the stipulation voluntarily in the sense that defendant was not coerced, and knowingly in the sense that defendant understood the potential sentencing consequences. *State v. Cheatham*, — Idaho —, 80 P.3d 349 (Ct. App. 2003).

Proof.

In prosecution of recidivist where prior convictions were in another state, the prosecution was required to establish jurisdiction of court in prior conviction, both of the accused and of the subject matter. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942).

In prosecution of recidivist where previous convictions were in another state, certified copies of the judgments, properly authenticated, were admissible in evidence and entitled to "full faith and credit" which would have been accorded them in the state where they were rendered. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942).

Where judgment of the courts of another state convicting accused of felonies, establish that such court had a presiding judge, a clerk, and a seal, it would be presumed that such courts were courts of general jurisdiction, that such judgment were final and were the "best evidence" of what they showed on their face, establishing the jurisdiction of such court. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942).

Where a certified copy of a federal judgment of conviction of someone with the defendant's name complied with the requirements of § 9-312 regarding the proper authentication of a judicial record, and was admitted without objection, and photocopied records of a mug shot and fingerprint card of the defendant, which were certified by the official custodian

of records at a federal prison, were also introduced into evidence, the jury could, and did, find that the defendant in the present prosecution and the person involved in the federal conviction were the same person for the purpose of enhanced punishment as a persistent violator of the law. *State v. Martinez*, 102 Idaho 875, 643 P.2d 555 (Ct. App. 1982).

The general principle that, absent proof to the contrary, a court will assume that the law of a sister state is the same as that which prevails in Idaho should not be applied to the state's burden of proving persistent violator status. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Although persistent violator status is not a separate crime, it is pleaded in the same fashion as a crime and must be proved beyond a reasonable doubt. Consequently, where the state failed to make a required showing, as part of its prima facie case on the persistent violator charge, that the prior convictions were for felonies under the laws of the state where the offenses occurred, the district court properly dismissed the persistent violator charge. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

District court in instant case could completely discount defendant's uncontradicted testimony that he was not advised of his rights before pleading guilty to prior felonies and thereby relieve the state of its burden to rebut such testimony. The state only had to produce prima facie evidence that defendant was convicted of the prior felonies — which the state produced in the form of the judgment of convictions. *State v. Miller*, 131 Idaho 288, 955 P.2d 603 (Ct. App. 1997).

Purpose.

The purpose of the persistent violator statute is to enhance punishment for repeat offenders. *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986).

Retention of Jurisdiction.

The trial court did not abuse its jurisdiction in failing to retain jurisdiction over the defendant for 120 days, where defendant had spent most of his life, both as a juvenile and as an adult, in correctional institutions, where his past record included six burglary or grand larceny convictions and one escape conviction, and where defendant was previously convicted and sentenced as a persistent violator of the law in 1961. *State v. Shanacropoulos*, 100 Idaho 789, 605 P.2d 967 (1980).

Requisite Conditions.

The only condition requisite to establish the status of a persistent violator is that the

accused shall have been convicted the third time of a felony. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

Separate Sentence.

This section does not create a new crime, but instead provides for the imposition of greater punishment for the underlying conviction; therefore, the trial court should not have imposed a separate sentence for the persistent violator allegation. *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).

This section does not establish a separate offense nor does it authorize a separate sentence. *State v. Blevins*, 108 Idaho 239, 697 P.2d 1253 (Ct. App. 1985).

Where, in a prosecution for kidnapping, the trial court imposed a separate sentence because the defendant was a persistent violator, such separate sentence was an error of law which rendered the entire sentence invalid ab initio; thus, the trial court was obligated to correct the sentence under I.C.R. 35. *Lopez v. State*, 108 Idaho 394, 700 P.2d 16 (1985).

Persistent violator status is not a separate crime; it is simply a determination that broadens a judge's sentencing options. *State v. Smith*, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989).

Suspended Sentence.

Because this enhancement statute broadens the judge's possible sentencing options, the court was free to impose a suspended sentence even if the defendant were adjudicated a persistent violator. *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).

Any procedural error committed by the district court in its imposition of a suspended sentence was harmless where the district court's sentencing statement demonstrated the court was fully aware of the defendant's prior record and that the sentence would have been no different even if the defendant had been sentenced as a persistent violator. *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999).

"White Collar Crime."

The courts can, and should, recognize a distinction between violent and nonviolent offenses when considering whether to impose sentences of imprisonment. But the label "white collar crime" does not, by itself, immu-

nize an offender from a penalty of confinement; when such crimes cause serious hardship for the victims or reflect a fundamental disregard for the law, a substantial period of incarceration may be appropriate. Thus, where the defendant was adjudicated a persistent violator and had engaged in a lifestyle of dishonesty, an indeterminate sentence of 18 years was not an abuse of sentencing discretion. *State v. Harrison*, 108 Idaho 324, 699 P.2d 30 (Ct. App. 1985).

Collateral References. Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 A.L.R. 20; 82 A.L.R. 345; 116 A.L.R. 209; 132 A.L.R. 91; 139 A.L.R. 673.

Prior conviction, effect of pardon for, as precluding consideration of, under statute imposing higher penalty for subsequent offense. 132 A.L.R. 103; 139 A.L.R.3d 673.

Identity, necessity of proof, for purposes of statute as to enhanced punishment in case of prior conviction. 139 A.L.R. 693.

Other offenses committed by defendant, right of court in imposing sentence to consider, in absence of statute in that regard. 96 A.L.R.2d 768.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

The language of this section plainly imputes a policy of measuring a defendant's conduct against the standards prescribed by the laws of the state where each prior offense was committed. *State v. Williams*, 103 Idaho 635, 651 P.2d 569 (Ct. App. 1982), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

This section does not create a new crime, but merely provides for greater punishment for the latest conviction than that which might have been inflicted had there not been two prior convictions. *State v. Greensweig*, 102 Idaho 794, 641 P.2d 340 (Ct. App. 1982).

A punishment set by a duly elected legislature is presumed to be valid so long as the penalty is not cruelly inhumane or disproportionate to the crime involved and a heavy burden rests on those who challenge the presumed validity of a punishment. *State v. Martinez*, 107 Idaho 928, 693 P.2d 1130 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1985).

19-2515. Sentence in capital cases — Special sentencing proceeding — Statutory aggravating circumstances — Special verdict or written findings. — (1) Except as provided in section 19-2515A, Idaho Code, a person convicted of murder in the first degree shall be liable for the imposition of the penalty of death if such person killed, intended a killing, or acted with reckless indifference to human life, irrespective of whether such person directly committed the acts that caused death.

(2) Where a person is sentenced to serve a term in the penitentiary, after conviction of a crime which falls within the provisions of section 20-223, Idaho Code, except in cases where the court retains jurisdiction, the comments and arguments of the counsel for the state and the defendant relative to the sentencing and the comments of the judge relative to the sentencing shall be recorded. If the comments are recorded electronically, they need not be transcribed. Otherwise, they shall be transcribed by the court reporter.

(3) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless:

(a) A notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code; and

(b) The jury, or the court if a jury is waived, finds beyond a reasonable doubt at least one (1) statutory aggravating circumstance. Where a statutory aggravating circumstance is found, the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust. The jury shall not direct imposition of a sentence of death unless it unanimously finds at least one (1) statutory aggravating circumstance and unanimously determines that the penalty of death should be imposed.

(4) Notwithstanding any court rule to the contrary, when a defendant is adjudicated guilty of murder in the first degree, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, no presentence investigation shall be conducted; provided however, that if a special sentencing proceeding is not held or if a special sentencing proceeding is held but no statutory aggravating circumstance has been proven beyond a reasonable doubt, the court may order that a presentence investigation be conducted.

(5)(a) If a person is adjudicated guilty of murder in the first degree, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, and a notice of intent to seek the death penalty was filed and served as provided in section 18-4004A, Idaho Code, a special sentencing proceeding shall be held promptly for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. Information concerning the victim and the impact that the death of the victim has had on the victim's family is relevant and admissible. Such information shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community by the victim's death. Characterizations and opinions about the crime, the defendant and the appropriate sentence shall not be permitted as part of any victim impact information. The special sentencing proceeding shall be conducted before a jury unless a jury is waived by the defendant with the consent of the prosecuting attorney.

(b) If the defendant's guilt was determined by a jury verdict, the same jury shall hear the special sentencing proceeding; provided however, that if it is impracticable to reconvene the same jury to hear the special

sentencing proceeding due to an insufficient number of jurors, the trial court may dismiss that jury and convene a new jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code.

(c) If the defendant's guilt was determined by a plea of guilty or by a decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including, but not limited to, a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code, unless such jury is waived.

(d) If a special sentencing proceeding is conducted before a newly impaneled jury pursuant to the provisions of subsection (5)(b) or (5)(c) of this section, the state and the defense may present evidence to inform the jury of the nature and circumstances of the murder for which the defendant was convicted. The newly impaneled jury shall be instructed that the defendant has previously been found guilty of first-degree murder and that the jury's purpose is limited to making findings relevant for sentencing.

(6) At the special sentencing proceeding, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Disclosure of evidence to be relied on in the sentencing proceeding shall be made in accordance with Idaho criminal rule 16. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing.

(7) The jury shall be informed as follows:

(a) If the jury finds that a statutory aggravating circumstance exists and no mitigating circumstances exist which would make the imposition of the death penalty unjust, the defendant will be sentenced to death by the court.

(b) If the jury finds the existence of a statutory aggravating circumstance but finds that the existence of mitigating circumstances makes the imposition of the death penalty unjust or the jury cannot unanimously agree on whether the existence of mitigating circumstances makes the imposition of the death penalty unjust, the defendant will be sentenced to a term of life imprisonment without the possibility of parole; and

(c) If the jury does not find the existence of a statutory aggravating circumstance or if the jury cannot unanimously agree on the existence of a statutory aggravating circumstance, the defendant will be sentenced by the court to a term of life imprisonment with a fixed term of not less than ten (10) years.

(8) Upon the conclusion of the evidence and arguments in mitigation and aggravation:

(a) With regard to each statutory aggravating circumstance alleged by the state, the jury shall return a special verdict stating:

(i) Whether the statutory aggravating circumstance has been proven beyond a reasonable doubt; and

- (ii) If the statutory aggravating circumstance has been proven beyond a reasonable doubt, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust.
- (b) If a jury has been waived, the court shall:
 - (i) Make written findings setting forth any statutory aggravating circumstance found beyond a reasonable doubt;
 - (ii) Set forth in writing any mitigating circumstances considered; and
 - (iii) Upon weighing all mitigating circumstances against each statutory aggravating circumstance separately, determine whether mitigating circumstances are found to be sufficiently compelling that the death penalty would be unjust and detail in writing its reasons for so finding.
- (9) The following are statutory aggravating circumstances, at least one of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
 - (a) The defendant was previously convicted of another murder.
 - (b) At the time the murder was committed the defendant also committed another murder.
 - (c) The defendant knowingly created a great risk of death to many persons.
 - (d) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.
 - (e) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
 - (f) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
 - (g) The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life.
 - (h) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
 - (i) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty or because of the victim's former or present official status.
 - (j) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding. [R.S., R.C., & C.L., § 7992; C.S., § 9036; I.C.A., § 19-2415; am. 1977, ch. 154, § 4, p. 390; am. 1984, ch. 230, § 1, p. 549; am. 1995, ch. 140, § 1, p. 594; am. 1998, ch. 96, § 3, p. 343; am. 2000, ch. 287, § 1, p. 968; am. 2003, ch. 19, § 4, p. 7; am. 2003, ch. 136, § 3, p. 394; am. 2004, ch. 317, § 1, p. 889.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

This section was amended by two 2003 acts

— ch. 19, § 4, effective February 13, 2003, and ch. 136, § 3, effective March 27, 2003 — which do not conflict and have been compiled together.

The 2003 amendment by ch. 19, § 4, rewrote the section heading, redesignated the subsections, and rewrote the text through subsection (8).

The 2003 amendment by ch. 136, § 3, added “Except as provided in section 19-2515A, Idaho Code” at the beginning of subsection (1).

Sections 3 and 5 of S. L. 1977, ch. 154 are compiled as §§ 18-4004 and 19-2827, respectively.

Section 2 of S.L. 1984, ch. 230 is compiled as § 20-224.

Sections 1 and 2 of S.L. 1998, ch. 96 are compiled as §§ 18-4004 and 18-4004A, respectively.

Section 3 of S.L. 2003, ch. 19 is compiled as § 19-2126.

Section 2 of S.L. 2003, ch. 136 is compiled as § 19-2126.

Section 7 of S.L. 2003, ch. 19 declared an emergency. Approved February 13, 2003.

Section 6 of S.L. 2003, ch. 136 declared an emergency. Approved March 27, 2003.

Section 2 of S.L. 2004, ch. 317 declared an emergency. Approved March 24, 2004.

Sec. to sec. ref. This section is referred to in I.C.R. 33.1 and §§ 18-4004, 19-2126, 19-2827 and 20-224.

Cited in: *State v. Weise*, 75 Idaho 404, 273 P.2d 97 (1954); *Jackson v. State*, 87 Idaho 267, 392 P.2d 695 (1964); *State v. Gish*, 89 Idaho 334, 404 P.2d 595 (1965); *Bement v. State*, 91 Idaho 388, 422 P.2d 55 (1966); *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967); *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979); *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979); *State v. Wilson*, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983); *State v. Camp*, 107 Idaho 36, 684 P.2d 1013 (Ct. App. 1984); *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985); *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991); *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1991); *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992); *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993); *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995); *State v. Sivak*, 127 Idaho 387, 901 P.2d 494 (1995); *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001); *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997), cert. denied, 523 U.S. 1126, 118 S. Ct. 1813, 140 L.

Ed. 2d 951 (1998); *State v. Row*, 131 Idaho 303, 955 P.2d 1082 (1998); *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002).

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Aggravating Factors.

This list of aggravating factors set forth in this section is not exclusive, albeit one of those factors must necessarily be found to exist beyond a reasonable doubt for a sentence of death to be upheld and where the sentencing judge formally finds, and his findings are substantiated, that there are statutory aggravating factors and those factors are not outweighed by mitigating circumstances,

he has complied with the statutory directives. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

The limiting constructions placed upon statutory aggravating circumstances in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), were set forth to provide a definitional aid to trial judges attempting to apply the circumstances to the particular facts of the case they are considering; there is no directive in either the statute or *Osborn*, supra, requiring a trial court to set out the specific language used in *Osborn*, supra, before the Supreme Court will uphold that court's findings. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Where the trial court expressly found four of the statutory aggravating circumstances to exist beyond a reasonable doubt, it did not err in also considering nonstatutory aggravating circumstances and the sentence was not imposed in violation of any of defendant's constitutional rights. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Where the evidence showed that the eight-month-old murder victim was severely injured through the use of tremendous force, the defendant admitted hitting the child with his fist, the defendant refused to render aid to the victim, and the defendant had a past criminal record of child abuse and assault with a deadly weapon, sufficient aggravating circumstances were present to justify imposition of the death sentence. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

The trial court's ruling was proper that the aggravating factor of "utter disregard for human life" overlapped the aggravating factor defining first degree murder and requiring specific intent found in this section. *State v. Bean*, 109 Idaho 231, 706 P.2d 1342 (1985).

Where the evidence supported the trial court's conclusions that murder was especially heinous, atrocious or cruel, manifesting exceptional depravity; that by the murder or the circumstances surrounding its commission defendant exhibited utter disregard for human life; and that the murder was committed in the commission of a felony, i.e., burglary, and was accompanied by the specific intent to cause the death of a human being, the trial court's finding of those aggravating circumstances was proper. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986).

The "utter disregard" factor refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing another

human being. *State v. Fain*, 116 Idaho 82, 774 P.2d 252, cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989), aff'd, *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

The record in this case supported the finding of aggravating circumstances where the court found (1) that the acts of defendant involved a clearly thought out and unprovoked attack in a restaurant filled with innocent people who were not involved in any manner in the confrontation between the defendant and the victims, (2) that defendant emptied his gun in the direction of the three individuals with whom he had had words, while patrons and employees sought cover, and (3) that defendant had demonstrated no remorse, having read a prepared statement to the court to the effect that the killing of one victim and the shooting of the others was justified because defendant was verbally insulted by deceased victim. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074, overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Each aggravating circumstance must provide a principled basis for distinguishing between those who deserve the death penalty and those who do not. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Statutory aggravating factor in Idaho Code § 19-2515(9)(h) is appropriate only to those cases where a police officer is killed by reason of the performance of an official duty; therefore, a district court did not err by imposing a life sentence in a first-degree murder case because the evidence showed that the officer was not killed because of any interaction or relationship with defendant. *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

Defendant's first-degree murder conviction was proper where there was overwhelming evidence against defendant and he failed to show that the setting of the trial was inherently prejudicial; further, the State asserted no facts to show any prior interaction between defendant and the victim that might have explained defendant's actions which were directed at the victim personally and the district court's finding that the victim's mere status as a police officer was the basis for her murder was thus insufficient to support a conclusion that the aggravating factor was proven beyond a reasonable doubt, Idaho Code § 19-2515(9)(h). *State v. Yager*, — Idaho —, 85 P.3d 656 (2004).

—Constitutional Application.

Aggravating factors considered in this section were not unconstitutionally applied to

the defendant in a capital case, as the defendant's mutilation of the victim's corpse was a circumstance surrounding the commission of the crime of murder and was properly considered as an aggravating factor and the statutory cite and facts averred in the information put the defendant on notice that aggravating factors would be considered in this case; and although former subsection (g)(8) [now (9)(h)], propensity to commit murder and a continuing threat to society, was applied unconstitutionally, the fact that two other aggravating factors were found and supported by the record required the defendant's death sentence be upheld. *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

The fact that the aggravating circumstance enumerated in former subsection (g)(7) of this section duplicates an element of first degree murder in § 18-4003 does not violate any constitutional standard. *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

—Factors Distinct.

Where the court found the following aggravating factors: "(a) The murder was especially heinous and cruel manifesting exceptional depravity" and "(b) The circumstances surrounding the killing exhibited utter disregard for human life," and where defendant contended that the aggravating factors denoted by the trial court as "(a)" and "(b)" overlapped, the court declined to reverse the judgment and order based on the overlapping of aggravating factors since the aggravating factors described two quite different kinds of culpability, each of which had been legislatively identified as a sentencing factor of special importance in cases where the death penalty may be imposed. *State v. Fain*, 116 Idaho 82, 774 P.2d 252, cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989), 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

—Improper Circumstances.

Where the magistrate noted that a fatality occurred as a result of a collision involving defendant's car and another vehicle but did not find that defendant's conduct caused the collision; without such a finding, statements made by the magistrate before sentencing suggest that he may have thought aggravating circumstances were shown by the death alone and a defendant's punishment should not be made more severe on account of circumstances that were not caused by his wrongful conduct. *State v. Detweiler*, 115 Idaho 443, 767 P.2d 286 (Ct. App. 1989).

To properly constitute aggravating circumstances, the elements contained in sections 18-4003(c) and (e) must be combined "with the

specific intent to cause ... death of a human being"; therefore, when judge failed to find such a specific intent beyond a reasonable doubt, he erroneously listed aggravating circumstances without determining if they should apply. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), cert. denied, 507 U.S. 1029, 113 S. Ct. 1840, 123 L. Ed. 2d 466 (1993), rev'd on other grounds, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

—Jury Determination.

Defendant's sentence was constitutional despite the fact that defendant was denied a jury determination of the aggravating circumstances enumerated in this section; to accept defendant's argument that the jury must be involved in determining whether aggravating circumstances exist, would be to conclude that the aggravating circumstances of this section are elements of first degree murder, and the circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Defendant has no constitutional right to a jury trial on the existence of aggravating circumstances. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), cert. denied, 507 U.S. 1029, 113 S. Ct. 1840, 123 L. Ed. 2d 466 (1993), rev'd on other grounds, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

The Idaho Constitution does not require that a jury determine that the defendant possessed the specific intent to kill during the commission of an enumerated felony. *State v. Fields*, 127 Idaho 904, 908 P.2d 1211 (1995), cert. denied, 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (1995).

—Nonstatutory Circumstances.

Where findings stated that at the time daughter left the barn after finding her mother bleeding and wounded, the life of victim probably could have been saved if she had received the necessary medical attention, and where defendant contended that the consideration of this "nonstatutory aggravating circumstance" violated the cruel and unusual punishment clause of the Eighth Amendment, trial court did not improperly consider circumstance since trial court made clear that its decision was not based on nonstatutory aggravating circumstances. *State v.*

Charboneau, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

In a sentencing context, there is no constitutional doctrine or other legal authority requiring that aggravating circumstances be proven beyond a reasonable doubt in non-capital cases. *State v. Breeding*, 116 Idaho 569, 777 P.2d 1242 (Ct. App. 1989).

—Reasonable Doubt.

A trial court, while it may consider all relevant circumstances in a particular case, must find at least one statutory aggravating circumstance to exist beyond a reasonable doubt and this satisfies the constitutional requirement of notice. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

The "beyond a reasonable doubt" standard applies to the existence of aggravating circumstances, not to the process of weighing them against the mitigating circumstances, which must occur before sentence is imposed. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Statutory aggravating circumstances, at least one of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed, must be found within the strictures of former subdivision (g) (now (9)) of this section i.e., that the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, or that the murder exhibited utter disregard for human life. *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599, cert. denied, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989).

—Unconstitutional Factor.

Defendant who was sentenced to death fairly presented claim that trial court's application of "continuing threat" aggravating factor was unconstitutional where although the state supreme court in inquiring into the mitigating and aggravating circumstances of such sentence never expressly referred to a constitutional challenge to the application of such factor, in defendant's brief he challenged the Idaho death penalty statute as unconstitutionally arbitrary. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

In imposing death penalty, trial court's finding that defendant had poor chance for rehabilitation founded on court's impermissible reliance on defendant's past non-violent, consensual or involuntary sexual conduct vi-

olated defendant's rights under the Eighth Amendment. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

In imposition of death sentence, trial court's finding that defendant was a continuing threat to society based on defendant's prior sexual history consisting exclusively of non-violent, consensual or involuntary conduct of having been the victim of incest, having engaged in homosexuality and having had abnormal sexual relationships with both younger and older women, thereby concluding he was a greater threat to society than most other first degree murderers, violated the Eighth Amendment of the U.S. Constitution. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Appeal.

Since reliance on defendant's past non-violent, consensual or involuntary sexual conduct in violation of the Eighth Amendment would clearly constitute reliance on an arbitrary factor, the court either explicitly or implicitly concluded that the application of such factor by sentencing judge did not violate the Eighth Amendment and defendant could then challenge the application of such factor in a federal habeas petition. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Burden of Proof.

This section does not violate the Eighth and Fourteenth Amendments by placing the burden on a defendant to prove that the existence of mitigating circumstances outweigh any aggravating circumstance that is found; only if at least one of the aggravating circumstances is found to exist beyond a reasonable doubt may a sentence of death be imposed and it is only then that a defendant has the burden of coming forward with mitigating circumstances. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Conduct of Defendant.

Where Supreme Court vacated defendant's original sentence of death because the trial judge failed to pronounce the sentence in the presence of the defendant as required by Idaho law and ordered resentencing to occur within 14 days from the date of its order, defendant should have had an opportunity to introduce mitigating testimony relating to his conduct during the 14 months between his

sentencing and resentencing hearings, for there is no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which was vacated on appeal. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

Constitutionality.

The aggravating circumstance of "exceptional depravity" is facially constitutional and is sufficiently definite and limited to guide the sentencing court's discretion in imposing the death penalty since it requires that the murder must be accompanied by acts setting it apart from the norm of murders and that its commission manifests such depravity as to offend all standards of morality and intelligence. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

It is unconstitutional for a legislature to limit the sentencing body's consideration of mitigating factors to those enumerated in a statute; accordingly, the failure of this section to specify mitigating factors does not render it unconstitutional. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

The language "utter disregard for human life" is facially constitutional and the phrase "utter disregard" contained therein must be viewed with reference to acts other than those set forth in former subdivision (f) (now (9)) of this section; moreover, since the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, utmost callous disregard for human life, this aggravating circumstance is not unconstitutionally vague. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Former subdivision (f) (now (9)(h)) of this section merely requires a finding, beyond a reasonable doubt, of the existence within a defendant of a propensity to commit murder likely to cause a threat to society; thus read it is not unconstitutionally vague. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

There is no federal constitutional requirement of jury participation in the sentencing process and that decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states; the policy judgment of the Idaho legislature, which places capital sentencing discretion in the district judges of the state with mandatory appellate review vested in Supreme Court, which has statewide jurisdiction, meets any test of constitutionality. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

The statutory aggravating circumstance that by the murder and the circumstances surrounding it defendant exhibited an utter disregard for human life, is not unconstitutionally vague. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); see also *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1991).

The statutory language of former subdivision (f) (now (9)(h)) this section is not facially unconstitutional. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); see also *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1991).

The process of weighing aggravating and mitigating circumstances, is not unconstitutional. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

The sentencing provisions of §§ 19-2501 to 19-2521 satisfy the guidelines from the various holdings of the United States Supreme Court in death penalty cases. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); see also *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1991).

Former subdivisions (f)(6) and (f)(8) (now (9)(f) and (9)(h)) of this section are not unconstitutionally vague. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *Gibson v. State*, 110 Idaho 631, 718 P.2d 283 (Ct. App. 1986).

This state's capital sentencing scheme does not violate the state and federal Constitutions because of its failure to require that a jury, not the judge, impose a sentence of death. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 408 (1986).

Defendant's argument that aggravating circumstances delineated in this section are unconstitutional was rejected since petitioner's death sentence was imposed by a judge and since the Idaho Supreme Court has effectively narrowed the definition of aggravating circumstances. *Fetterly v. Paskett*, 744 F. Supp. 966 (D. Idaho 1990).

Where only three of the aggravating circumstances in this section were found to exist in sentencing a capital murder defendant, on appeal the defendant could only attack the constitutionality of those three; he had no constitutional standing to attack the seven remaining circumstances for vagueness when his death sentence was not entered pursuant to any of them. *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), rev'd on other

grounds, 997 F.2d 1295 (9th Cir. 1993).

Former subdivisions (g)(5)-(7) (now (9)(e) and (9)(f)) of this section were upheld as not being unconstitutionally vague. *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), *rev'd* on other grounds, 997 F.2d 1295 (9th Cir. 1993).

To the extent any of the definitions of aggravating factors of this section analyzed and adopted in *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, *cert. denied*, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), are inconsistent with those contained in *State v. Fain*, 116 Idaho 82, 774 P.2d 252, *cert. denied*, 493 U.S. 317, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989), the Supreme Court reaffirms the definitions contained in *State v. Charboneau* and holds that the aggravating factors of this section are not constitutionally vague. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), *cert. denied*, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074, overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

Former subsection (c) (now (3)) of this section is not unconstitutional on the basis that it provides a mandatory sentencing formula, as it is not impermissibly mandatory and the requirement of individualized sentences in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of the choice" between the alternative verdicts of death and life imprisonment. Thus, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty), and accordingly, the sentencing scheme provided under this section does not violate constitutional safeguards and protections. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), *cert. denied*, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

The aggravating circumstances contained in this section are not vague and overbroad, and do not violate the Eighth Amendment to the United States Constitution and Idaho Const., Art. 1, § 6. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), *cert. denied*, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

The "utter disregard for human life" circumstance in former subdivision (g) (now (9)) of this section, as interpreted by the Idaho Supreme Court in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), was not unconstitutionally vague. *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1992).

The use of the word "probably" does not imply a "preponderance of the evidence" standard rather than a "beyond a reasonable doubt" standard, and therefore former subdivision (g) (now (9)(h)) of this section is not unconstitutionally vague. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

Since the state was required to prove every element of the offense charged, including the statutory aggravating circumstances, the burden placed on murder defendant by operation of former subsection (c) (now (3)) of this section did not violate his constitutional rights. *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), *cert. denied*, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

Construction.

Term "circumstances" as used in this section includes not only the surrounding facts of the crime committed which tend to aggravate or mitigate the character of the conduct involved, but also includes the background, age, upbringing and environment of the defendant himself. *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953), overruled on other grounds, *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971).

Under the established rules of statutory construction, the language of this section must be construed as being consistent with the language of § 19-2516 (now repealed), if such construction is at all possible. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), *cert. denied*, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

Correct Balancing of Factors.

Upon conviction of defendant for first degree murder, court did not abuse its discretion in sentencing defendant to a fixed life sentence instead of death where judge balanced mitigating factors that defendant did not have a history of violence, that he possessed job skills as a truck driver, and had been a productive member of society, that drug and alcohol dependency adversely affected his thought process and some conduct on his part was inconsistent with a desire to murder the victim and defendant had exhibited extreme remorse for the crime, with the aggravating factors that the crime was atrocious and cruel, manifesting exceptional depravity and that the person murdered was a person who was a potential witness for the state in a criminal proceeding and who was murdered to prevent her from testifying. *State v. Wages*, 119 Idaho 738, 810 P.2d 272 (Ct. App. 1991).

Where the record clearly demonstrates that

the District Court examined potential mitigating factors proffered by defendant and noted apparent weaknesses and inconsistencies, there was no error in this process and the trial court properly applied the weighing test by weighing all mitigating circumstances against the single aggravating circumstance. *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991), cert. denied, *Leavitt v. Idaho*, 506 U.S. 972, 113 S. Ct. 460, 121 L. Ed. 2d 368 (1992).

Where the trial court set forth four and a half pages of mitigating circumstances in his findings, the findings were sufficient to show that the trial court completed the weighing process satisfactorily, as it is enough to have one section setting forth all mitigating factors and one section setting forth all aggravating circumstances. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the trial court outlined the mitigating factors in detail, taking into consideration the defendant's education, social and economic status, vocational skills, drug and alcohol use, criminal record, personal redeeming characteristics, and the fact that he had been a cooperative prisoner since the time of his arrest and the court then went on to find three aggravating factors: (1) that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity;" (2) that it was murder of the first degree committed with the specific intent to cause the death of a human being, and (3) that the defendant "has exhibited a propensity to commit murder which will probably constitute a continuing threat to society," after weighing the mitigating factors against the aggravating circumstances, the trial court imposed the death penalty. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

A trial court must weigh each of the aggravating circumstances separately against all of the mitigating circumstances in its consideration of the death penalty, and may not conduct an aggregate weighing process. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Court's Discretion.

In prosecution where court has discretion of sentencing to penitentiary for felony or jail for misdemeanor, the court may sentence some of defendants to penitentiary and some to jail. *State v. Farnsworth*, 51 Idaho 768, 10 P.2d 295 (1932).

Where the district court advised the parties of the record upon which it relied, where the defendant had been before the court in the recent past and had been sentenced by the same judge little more than a month before, a

fact known to all parties, where the district court afforded defendant the opportunity to offer evidence in defendant mitigation but that opportunity was declined, and where there was no objection made to the district court's method of proceeding, there was no abuse of discretion in sentencing defendant to maximum term for escape. *State v. Adair*, 100 Idaho 238, 596 P.2d 110 (1979).

In the absence of an explicit request for a formal hearing, the court may reach its sentencing decision by receiving the unsworn formal statements presented by both sides, together with the presentence report and arguments of the respective counsel. *State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980).

The legislative requirement of this section that all mitigating factors considered must be set forth in writing is mandatory and serves the dual purpose of focusing the attention of the sentencing court upon all of the information before it, thus requiring a thorough and reasoned analysis of all relevant factors, and of making the process for imposing death rationally reviewable. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Death Penalty.

All of the procedures mandated in potential death penalty cases were followed where defendant was in attendance at the pronouncement of sentence, where written findings on aggravating and mitigating circumstances were made, where defendant was given notice that the State intended to ask for the death penalty and was given notice of the State's intent to rely on the aggravating circumstances set forth in this section, where defendant was allowed to submit a document to the court setting forth mitigating circumstances and that document and its contents were considered by the trial court and an aggravation/mitigation hearing was held, evidence was taken, and arguments heard thereon and where the trial court issued written findings setting forth the mitigating factors found beyond a reasonable doubt. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

The death penalty is not an unduly severe punishment for an aider and abettor to a murder when that person intends that a killing take place; accordingly, where there was no doubt from the evidence, that defendant intended that victim be killed in order to conceal another murder, which she witnessed, the death penalty was appropriate. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

Where there was no indication that sentence was imposed under the influence of passion, prejudice or any other arbitrary fac-

tor, the record supported the trial court's finding of aggravating circumstances and the sentence was not disproportionate to the penalty imposed in other cases, the judgment of the district court imposing the death penalty was affirmed. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986).

Where both the trial judge and the jury found that the defendant intentionally participated in a killing while perpetrating a felony, there was no merit to the defendant's contention that the imposition of the death penalty was constitutionally impermissible under the mandate of *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which held that the Eighth Amendment of the United States Constitution forbids the imposition of the death penalty against one who neither took life, attempted to take life, nor intended to take life. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

If the mitigating circumstances outweigh each aggravating circumstance found, the imposition of the death penalty would be unjust. If the mitigating circumstances do not outweigh each aggravating circumstance found, the imposition of the death penalty is just. *State v. Sivak*, 119 Idaho 320, 806 P.2d 413 (1990).

This section does not preclude the trial court from considering any type of mitigating evidence, nor does it require the trial court automatically to impose death upon a defendant who has been convicted for certain types of murder. The statute allows the trial court to exercise its discretion within the structure established by the legislature for considering mitigating circumstances. *State v. Sivak*, 119 Idaho 320, 806 P.2d 413 (1990).

Where the court found aggravating circumstances in that defendant committed a most heinous, atrocious and cruel murder of nine year old girl after kidnapping her off the street and sexually assaulting her thereby exhibiting utter disregard for human life and that the mitigating circumstance did not outweigh the aggravating factors, court understood holding in *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989), and applied this section correctly; thus sentence of death was properly imposed. *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where defendant had not identified any prejudice resulting from nondisclosure or advance notice or warning of those aggravating circumstances relied upon by the state that could not have been cured by resort to the protections afforded by this section, defen-

dant's right to due process of law under the United States Constitution and the Idaho Constitution, were not violated as a result of nondisclosure by the state prior to trial of evidence relating to aggravating circumstances to be relied upon in support of seeking the death penalty. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

—Age of Defendant.

The age of a defendant is a legitimate consideration in the evaluative process as a mitigating factor; the legislature's failure to list any mitigating factors in the capital sentencing scheme indicates its intent that the sentencing judge entertain the broadest view possible in considering any and all matters appropriate to a determination of imposition of the death penalty. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

The age of a victim is a legitimate consideration in viewing the aggravating circumstances. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

—Propensity to Kill.

District court properly admitted evidence that murder defendant had previously been indicted in Ohio for a separate murder; the Ohio evidence was considered in determining whether defendant had the propensity to kill. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

—Right to Jury.

Neither the United States Constitution nor Const., Art. 1, § 7 requires the participation of a jury in the sentencing process in a capital case. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984); *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

The imposition of the death penalty with no participation by the jury in the sentencing process does not violate the Idaho Constitution. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

—Specific Intent.

Where in trial of defendant convicted of murder and sentenced to death judge failed to indicate that he found specific intent beyond a reasonable doubt, as an aggravating factor petitioner for habeas corpus was entitled to

release if judge at resentencing applied the aggravating circumstances under this section without making a finding of specific intent. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

Bank robbers who carried a sawed-off shotgun into the bank, pointed it at a teller at a range of less than two feet and pulled the trigger, killing the teller, committed the robbery with the specific intent to kill as required by this section. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

Where the existence of the aggravating sentencing factor, the specific intent to kill, is supported by evidence in the record, the district court may find that the accused possessed this statutory aggravating circumstance, thus justifying the death penalty sentence. *State v. Fields*, 127 Idaho 904, 908 P.2d 1211 (1995), cert. denied, 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (1995).

Disclosure to Defendant.

A defendant in a first-degree murder case was not denied due process in the sentencing procedure when the state failed to inform him of the particular aggravating circumstance which it intended to prove beyond a reasonable doubt at the sentencing hearing since the court, pursuant to this section, expressly told the state to disclose to the defendant the evidence and arguments to be relied upon at the hearing, and the state did so. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Failure of the state to forewarn a defendant in a first-degree murder prosecution as to which aggravating circumstances it will seek to prove beyond a reasonable doubt at his sentencing hearing does not deny him due process since this section clearly indicates that one of the listed aggravating circumstances must be proven beyond a reasonable doubt and must outweigh any mitigating circumstances shown, prior to the imposition of the death penalty, so that there will be no surprise under the facts of any given case as to what potential aggravating circumstances are involved; moreover, defense counsel will ordinarily be conversant with the facts and issues involved in the hearing by virtue of earlier proceedings in the trial. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Due Process.

The statutory scheme of this section, which requires that a death penalty be imposed unless the court finds that the mitigating circumstances outweigh the aggravating circumstances, does not violate due process by impermissibly shifting the burden of proof to the defendant since the weighing process in determining the propriety of capital punishment does not involve shifting the burden of persuasion but rather is concerned with the presentation of information relevant to the sentence in order that a reasoned and consid-

ered decision can be reached; thus, the defendant's burden is merely to raise any factors which might tend to mitigate his culpability for the offense. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

At the time of accused's sentencing hearing on two first-degree murder convictions, after which hearing accused was sentenced by presiding judge to death, accused and accused's counsel did not have notice, sufficient to satisfy due process clause of Federal Constitution's Fourteenth Amendment, that judge might sentence accused to death, where (1) at accused's arraignment, judge advised accused that maximum punishment under state law that accused could receive if convicted on either count was life imprisonment or death; but (2) between time of conviction and time of sentencing hearing, prosecutor, pursuant to court order requiring state to notify court and accused whether state would ask for death penalty, formally advised trial judge and accused that state would not recommend death penalty; and (3) at sentencing hearing, although judge indicated that death penalty was option, neither accused's counsel nor prosecutor discussed death penalty as possible sentence. *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 172 (1991), appeal after remand, remanded, 127 Idaho 608, 903 P.2d 1305 (1995), cert. denied, 517 U.S. 1128, 116 S. Ct. 1370, 134 L. Ed. 2d 535 (1996).

The due process notice requirements at sentencing are not necessarily the same as those at trial. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Petitioner's motion for stay in order to exhaust in state court newly identified Constitutional claims was predicated on a cognizable claim that in enacting and enforcing this section, Idaho has created a liberty interest protected under due process of the Fourteenth Amendment; sentencing court's failure to follow this section raised an issue cognizable under habeas corpus. *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), cert. denied, 513 U.S. 914, 115 S. Ct. 290, 130 L. Ed. 2d 205 (1994).

It is not a violation of due process to resentence a defendant originally sentenced to death under the provisions of this section as it read prior to *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed. 2d 556, 122 S. Ct. 2428 (2002), which provisions formerly allowed the court, rather than the jury, to make findings of fact on aggravating and mitigating circumstances. *State v. Lovelace*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 62 (Apr. 22, 2004).

Evidence.

It was not error to admit into evidence at hearing pictures of victim's body and scenes at place of crime. *State v. Powell*, 71 Idaho 131, 227 P.2d 582 (1950).

It was error for the court, after defendant's conviction of statutory rape to refuse to grant defendant before sentence opportunity to present testimony of character witnesses and medical evidence. *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968).

The evidence of the defendant's behavior in jail prior to sentencing was relevant mitigating evidence, and the court erred in not considering it. *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

Exceptional Depravity.

In Idaho a defendant in a capital case is sentenced by a district judge presumed to know the law; therefore, the language "exceptional depravity" of the aggravating circumstance in this section is not unconstitutionally vague. *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991), cert. denied, *Leavitt v. Idaho*, 506 U.S. 972, 113 S. Ct. 460, 121 L. Ed. 2d 368 (1992).

Findings.

Where court simply stated that there were no mitigating factors present, it failed to comply with this section since the findings mandated are necessary to provide a meaningful basis for distinguishing cases in which a death penalty is imposed from those in which it is not; however, where trial court did not abuse its discretion in sentencing defendant to a determinate life term and death sentence was not imposed, the failure to comply was not reversible error. *State v. Osborn*, 104 Idaho 809, 663 P.2d 1111 (1983).

The practical effect of this section is not to require the judge to set out each and every circumstance presented to him in mitigation, but rather, the plain language of the statute requires the judge to list that evidence which, in his capacity as a fact finder, he has found to be valid, competent, and pertinent to the issue of whether the death penalty should be imposed. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

Where each mitigating factor set forth by the defendant was examined by the trial court and the court discussed why each, in turn, should or should not be considered mitigating and the trial court then also considered factors not listed by the defendant which could possibly be considered as mitigating, the trial court properly enumerated and considered mitigating circumstances as required by this section. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

Evidence did not support a critical portion

of the findings which stated that after firing the first volley of shots, the victim was wounded but her life could have been saved if she had received necessary medical attention; pathologist testified that he had no opinion as to which of the bullets caused the fatal wounds and that it was beyond the expertise of a pathologist to give an opinion as to the order in which the wounds occurred, and there was no other evidence in the record that contradicted this testimony. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

In cases where the death penalty is not an issue judges are encouraged, but not required, to state reasons for their sentencing decisions; a fortiori, findings of fact are not required in such cases, however, a narrow exception exists where a finding is necessary to resolve a particular factual dispute that is pivotal to the determination of a reasonable sentence. *State v. Breeding*, 116 Idaho 569, 777 P.2d 1242 (Ct. App. 1989).

Hearing.

Matters in mitigation may be heard before sentencing either upon motion of the court or upon the oral suggestion of either party, and where evidence in mitigation was offered it was not error to fail to advise the defendant of a right to hearing in mitigation. *State v. Yoelin*, 94 Idaho 791, 498 P.2d 1264 (1972).

Where, on appeal, there was no basis in the record for a remark made by the trial judge, following sentencing, relating to defendant's involvement in a particular drug transaction, the appellate court remanded the case for a hearing in mitigation or aggravation. *State v. Wallace*, 98 Idaho 318, 563 P.2d 42 (1977).

—Use of Preliminary Hearing Transcript.

The manifest intent of this section is to place as much relevant information as possible before the sentencing court; accordingly, it was not error, in an aggravation/mitigation hearing following a first-degree murder conviction, for the court to use the transcript of the preliminary hearing. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

—Use of Presentence Report.

Even when a formal hearing is requested, it is proper for the court to receive and consider a presentence report; the hearing presents an opportunity to challenge or to rebut the report. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Heinous, Atrocious, or Cruel.

The aggravating factor referring to the special heinousness, atrociousness or cruelty of

the murder and the depravity of the act, specifically refers to the personal culpability of the killer exhibited by the manner in which the crime was committed. *State v. Fain*, 116 Idaho 82, 774 P.2d 252, cert. denied, 493 U.S. 917, 110 S. Ct. 277, 107 L. Ed. 2d 258 (1989), aff'd, *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where defendant ordered first victim to drop his trousers to his knees and crawl into a cabin, where he bludgeoned him with a hammer, and where likewise, defendant's second victim was similarly beaten to death with hammer blows to the head, the brutal manner in which the victims were murdered clearly supported the trial court's finding that the murders were especially heinous, atrocious or cruel manifesting exceptional depravity. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Individualized Sentencing.

The word "shall" in former subsection (c) (now (3)) of this section is not "impermissibly mandatory," and the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), cert. denied, 507 U.S. 1029, 113 S. Ct. 1840, 123 L. Ed. 2d 466 (1993), rev'd on other grounds, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Investigation.

There is nothing in this section that prevents court from making investigation of its own motion. *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924).

Issues for Jury.

If it is proper for the court to hear and consider evidence in aggravation or mitigation of the punishment, the jury where it is called upon to fix the punishment should have the opportunity to consider such proof, subject to a proper instruction limiting the jury's consideration of such evidence to the determination of punishment and cautioning that it is not to be considered in determining guilt or innocence. *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

Mental Status of Defendant.

Where the court clearly heard and considered evidence of defendant's mental status from the testimony of a psychiatrist and a psychologist and from the voluminous information available in the presentence report

and the court reasonably concluded that defendant was of average intelligence, that he had exhibited an excessively violent rage in committing the crime, and that he was beyond rehabilitation, such findings were amply supported by the evidence and the fact that the court did not mention evidence of defendant's reduced capacity in its findings did not indicate that it had erroneously failed to consider such evidence. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

Despite the fact that (1) a forensic psychiatrist testified that defendant convicted of first degree murder, suffered to a moderate degree from an anti-social personality disorder that would diminish with age causing a precipitous drop in criminality after age forty, that (2) the psychiatrist further testified that defendant's severe alcoholism problem stemmed from genetic overloading over which he had no control and for which there was no treatment, that (3) based upon his observations the psychiatrist then opined that defendant's history suggested that he was unlikely to be involved in violent crimes in the future, and that (4) a supervisor for the Department of Probation and Parole testified that based upon his experience he thought defendant could be considered for parole sometime in the future, it was clear that the trial court considered these factors, especially whether defendant posed a continuing threat to society, and although the court imposed a fixed life sentence with no possibility of parole, there was no abuse in the trial court's decision. *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991).

In a sentencing hearing on remand, although the district court did not specifically list or mention the evidence adduced at the defendant's original sentencing with respect to his capacity, this does not mean that the defendant's capacity was not considered by the court, as the court specifically considered evidence from the current hearing and concluded that the defendant may be genetically predisposed to violence and found this to be a mitigating factor. *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Mitigating Factors.

The word "circumstances" in a capital case should not only refer to the circumstances surrounding the commission of the crime and tending to aggravate or mitigate the character of the conduct involved, but should also include the convict himself as an individual, which would include his background, his age, upbringing and environment and any other matter appropriate to a determination of the

degree of culpability. *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

While the ingestion of drugs or alcohol by a defendant on the evening of the murder is not sufficient in itself to raise a defense in a first-degree murder prosecution any arguable impact of such substance abuse is a proper consideration in mitigation of punishment upon sentencing, since that appears to be the effect of § 18-116. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

While the legislature has not provided any suggestions in this section as to what constitute mitigating factors, the circumstances would include the defendant's background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability and may be considered as extenuating or reducing the degree of moral culpability. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

In trial for first degree murder the trial court did not comply with the requirements of this section requiring the court to make written findings regarding mitigating factors by simply stating that there were not mitigating factors present; however, since the death sentence was not imposed no reversible error occurred. *State v. Osborn*, 104 Idaho 809, 663 P.2d 1111 (1983).

There was no evidence that defendant's silence in previous murder trial was held against him in considering whether his cooperation with police should be considered as mitigating, where the court merely found that there was no evidence that he had cooperated with the police. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

It is improper for a legislature to limit the sentencing body's consideration of mitigating factors to those enumerated in a statute; moreover, the legislature's failure to list any mitigating factors in its capital sentencing scheme indicates its intent that the sentencing judge entertain the broadest of views in considering any and all matters appropriate to a determination of culpability. *State v. Small*, 107 Idaho 504, 690 P.2d 1336 (1984).

The trial court erred in holding that the victim's prior criminal conduct, which did not amount to legal provocation for the offense of first-degree murder, constituted a mitigating factor. *State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985).

There is no authority for the proposition that this state's failure to expend adequate funds for inmate services is a factor to be considered in imposing the death penalty. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Where factual circumstances warrant, the sentencing court in a statutory rape case may

consider the reasonable belief of an accused regarding the age of the victim as a mitigating factor. *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (Ct. App. 1988), aff'd, 117 Idaho 405, 788 P.2d 220 (1990).

This section does not create a presumption in favor of the death penalty because it does not expressly state how the sentencing judge is to weigh the mitigating evidence; the capital sentencing procedures provide for individual sentencing and safeguards against arbitrary and capricious imposition of the death penalty. This section allows flexibility in sentencing by allowing the sentencer to consider all relevant mitigating evidence without limiting the mitigating factors that may be considered, and it does not create a presumption in favor of the death penalty and does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Since resentencing the defendant to the death penalty would have violated the double jeopardy clause, the appellate court would not vacate the sentence already imposed where sentence imposed was the maximum that could be imposed even if the trial court erroneously considered an inappropriate mitigating factor. *State v. Gray*, 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997), cert. denied, 522 U.S. 823, 118 S. Ct. 81, 139 L. Ed. 2d 39 (1997).

—Plea Negotiations.

Where the sentencing court was unaware of any plea negotiations, it was the responsibility of murder defendant to present the plea negotiations as a mitigating factor if he so desired. *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

Object of Section.

The hearing provided herein is intended to enlighten the court in pronouncing sentence as prescribed by law. This statute comes from territorial days and it has no reference to increased punishment for habitual criminals. This section does not permit a sentence in excess of that prescribed for the crime charged. *State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132 (1939).

Purpose of hearing is to enlighten the court in pronouncing sentence. *State v. Powell*, 71 Idaho 131, 227 P.2d 582 (1951).

Perjury.

Where, after a plea of guilty, the defendant's attorney examined him under oath preliminary to sentence, false statements

made in such examination were "material matters" and could be the subject of a prosecution for perjury. *State v. Martinez*, 89 Idaho 232, 404 P.2d 573 (1965).

Presentence Investigation and Report.

The closing language of § 19-2516 (now repealed) clearly and unambiguously provides an exception to the requirement of oral testimony and presentence reports authorized by this section fall within the purview of the intended exception; moreover, even if the provisions of the two statutes could not be harmonized, then the provisions of § 19-2516 (now repealed) would be construed to be superseded, since this section is the later enacted statute. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

The court has no discretion under former subsection (c) (now (3)) of this section and must order the conducting of a presentence investigation. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

Where there was no contention that the defendant was not afforded the required procedural protections, and the defendant at no point challenged the truth of any of the material contained in the presentence report, the court's admission of and consideration of the presentence report during sentencing in a capital case was not error. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

A presentence interview in a capital case is a "critical stage" for the purpose of the Sixth Amendment's right to counsel because the stakes for the defendant and for society are too high to allow defendants to face this important component of the sentencing process without counsel. *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), cert. denied, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001).

Prior Sexual Conduct.

State was forbidden to impose the death penalty on the basis of sentencer's moral disapproval of the primary conduct of defendant, a sexual history that was unrelated to a legitimate penological goal. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

The Eighth Amendment prohibited state from seeking retribution on factors that defendant had been the victim of incest, had engaged in homosexuality, or had abnormal sexual relationships with women of different ages. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Where state seeks to rely on defendant's non-violent, consensual or involuntary sexual

conduct as a basis for its decision to impose capital punishment, the state must introduce more than the mere facts of defendant's sexual history; specifically the state must, at least, introduce evidence demonstrating a close link between that history and defendant's future dangerousness. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Propensity to Commit Murder.

Where a sentencing court in a first-degree murder case found by a preponderance of the evidence that the defendant had exhibited a propensity to commit murder which would probably constitute a continuing threat to society, there was no error, even though a finding of aggravating circumstances by a preponderance of the evidence should not enter into the statutorily required evaluative process in the absence of legislative authorization, since the court stated that it was not relying on this finding as a statutory aggravating circumstance. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

"Propensity" under former subdivision (f)(8) (now (9)(h)) for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder; rather, the "propensity" language specifies that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation and propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

The finding of propensity to commit murder was clearly tailored and correct where the defendant committed murder at least four times prior to the last offense, where there were other pending charges of murder in the first degree against him, where the testimony of an eyewitness to one of defendant's previous murders, coupled with psychiatric evidence, tended to prove that he was violent and vengeful and that he experienced no remorse for his actions, where letters written by defendant to law-enforcement personnel detailed numerous alleged murders beyond those for which he had already been convicted and intimidated his intentions to kill in the future and where defendant's own statements claimed responsibility for approximately 40 murders. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

Subdivision (f)(8) (now (9)(h)) of this section cannot be interpreted to require only a finding

based on the preponderance of the evidence, rather than beyond a reasonable doubt, as it expressly states. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Findings that the defendant dominated his codefendant, and was primarily responsible for murder and that the defendant, both by prior conduct and conduct in the commission of the murder at hand, exhibited a propensity to commit murder which would probably constitute a continuing threat to society, were supported by an in-depth interview of accomplice and by evidence of the brutal murder committed by defendant, by his lack of remorse, willingness to participate in the crime, and by testimony of his prior offer to do violence to and, inferentially, to kill another person. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

Where a psychologist was retained pursuant to the defense's request and order of the district court to assist the defense, but the psychologist's report was used as part of the presentence report in violation of I.R.E. 503 without objection by counsel, the defendant established that the outcome of the case would have been different absent the error, and the finding of the existence of an aggravating factor under this section was vacated. *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999).

Proportionality Challenge.

A proportionality challenge to a sentence is inapplicable to other than death penalty cases, and the claim of defendants convicted of misdemeanor battery and sentenced to jail time, fines and probation that the sentences are out of proportion to the gravity of the offense committed were rejected. *State v. Donohoe*, 126 Idaho 989, 895 P.2d 590 (Ct. App. 1995).

Prosecutor's Comments.

Prosecutor's unsworn and unsubstantiated allegations during the sentencing hearing about defendant's prior drug dealings did not invalidate the proceedings. *State v. Newman*, 124 Idaho 415, 860 P.2d 618 (1993).

Prosecutor's Recommendations.

Because Idaho provides for sentencing by judge, a prosecuting attorney's sentencing recommendations are to be viewed just as that, mere recommendations; the trial judge makes the final decision as to what will be and will not be considered in sentencing. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Record Inadequate.

Supreme Court of Idaho was unable to determine if defendant's drug-related sentences were excessive, where inadequacies of the record rendered it impossible to discern the district court's reasoning in imposing the sentences. *State v. Newman*, 124 Idaho 415, 860 P.2d 618 (1993).

Sentence.

The trial court did not abuse its discretion in sentencing a murder defendant to a fixed life sentence where defendant's evidence of the possibility of his rehabilitation, standing alone, was not enough to meet the burden of showing unreasonableness. *State v. Charboneau*, 124 Idaho 217, 858 P.2d 756 (1993).

After considering defendant's age and the nature and circumstance of his crime, 25-year term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Sentencing by Judge.

Since the aggravating circumstances described in this section are terms of art that are commonly understood among the members of the judiciary, the potential for inconsistent application that exists as a result of jury sentencing is eliminated where the judge sentences. *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3295, 111 L. Ed. 2d 803 (1990).

Where in sentencing of defendant convicted of murder and sentenced to death judge found defendant did not instigate fight with the victim, but victim without provocation attacked him, and while he was initially justified in protecting himself, after victim was helpless, defendant killed him, by the murder itself or the circumstances surrounding its commission defendant did not demonstrate that he was a cold-blooded pitiless killer and thus such limited construction of "utter disregard for human life" was unconstitutionally vague. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991).

This section, which provides that a judge rather than a jury impose sentence in a cap-

ital case does not violate a defendant's constitutional rights; there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Where the evidence supports a conclusion that the murders committed by defendant were unprovoked, conscienceless and pitiless and where following the murders, defendant went back to a motel room, drank beer with his cohorts, had pictures taken of himself flaunting the pistol he stole from his victims, and joked and bragged about the killings with his associates, defendant demonstrated no remorse for his actions, and these acts surrounding the crime exhibited the highest and utmost callous, utter disregard for human life and supported the trial court's finding of aggravation under this section. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Sentencing by a judge without a jury in capital cases is not unconstitutional. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

Victim Impact Statements.

In conviction for first degree murder, lewd and lascivious conduct with a minor, and first degree kidnapping, where defendant was sentenced to death, while victim impact statements that consisted of a description of the emotional trauma suffered by the family and contained family members' opinions and characterizations of the crimes were erroneously admitted, since there was no indication that such statements were ever considered by the court or that they diverted the court from its primary function of considering the person being sentenced and not the victim or the victim's family, such error was harmless. (See 2004 amendment of this section). *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

At defendant's resentencing, victim impact evidence of characterizations and opinions about the crime, defendant, and the appropriate sentence were inadmissible because Idaho has not provided by statute or constitution

that victim impact evidence was a matter relevant to determination of the sentence in the sentencing phase of a capital case. *State v. Lovelace*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 62 (Apr. 22, 2004).

Weighing Factors.

Interpretation, that this section requires the trial court not to impose the death penalty if the mitigating circumstances outweigh any one of the aggravating circumstances found, is incorrect; trial court may sentence the defendant to death only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found. *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267, 493 U.S. 923, 110 S. Ct. 290, 107 L. Ed. 2d 270 (1989), overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

There was no error where there was no weighing process performed because the trial court found "nothing in mitigation." *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990).

When the death penalty has been imposed as a result of weighing the aggravating circumstances against the mitigating ones, the subsequent elimination as invalid of one of the aggravating factors alters the balance and, as a result, renders the state court's prior determination, that the death penalty is the appropriate penalty, unreliable. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Under this section, the judge was required to consider factors weighing in favor of or mitigating against the death penalty and the fact that the judge in performing this duty noted that one factor weighing against imposing the death penalty as punishment for defendant's crime was fact that defendant had information that could lead to the conviction of other individuals who may have participated in the murder, was not evidence that judge was biased toward defendant. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Opinions of Attorney General. A proposed amendment to § 19-2827 which would delete reference to comparative proportionality would not render Idaho's death penalty scheme unconstitutional, under either the federal or state constitutions. OAG 93-12.

Collateral References. Other offenses committed by defendant, right of court, in imposing sentence, to consider, in absence of statute in that regard. 96 A.L.R.2d 768.

Victim impact evidence in capital sentencing hearings — post-Payne v. Tennessee. 79 A.L.R.5th 33.

Downward departure under state sentencing guidelines based on extraordinary family circumstances. 106 A.L.R.5th 377.

19-2515A. Imposition of death penalty upon mentally retarded person prohibited. — (1) As used in this section:

(a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.

(b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

(2) In any case in which the state has provided notice of an intent to seek the death penalty pursuant to section 18-4004A, Idaho Code, and where the defendant intends to claim that he is mentally retarded and call expert witnesses concerning such issue, the defendant shall give notice to the court and the state of such intention at least ninety (90) days in advance of trial, or such other period as justice may require, and shall apply for an order directing that a mental retardation hearing be conducted. Upon receipt of such application, the court shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded; provided however, that no court shall, over the objection of any party, receive the evidence of any expert witness on the issue of mental retardation unless such evidence is fully subject to the adversarial process in at least the following particulars:

(a) If a defendant fails to provide notice as required in this subsection, an expert witness shall not be permitted to testify until such time as the state has a complete opportunity to consider the substance of such testimony and prepare for rebuttal through such opposing experts as the state may choose.

(b) A party who expects to call an expert witness to testify on the issue of mental retardation shall, on a schedule to be set by the court, furnish to the opposing party a written synopsis of the findings of such expert or a copy of a written report. The court may authorize the taking of depositions to inquire further into the substance of such synopsis or report.

(c) Raising the issue of mental retardation shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental retardation may be in issue.

(d) The court is authorized to appoint at least one (1) expert at public expense upon a showing by an indigent defendant that there is a need to inquire into questions of the defendant's mental retardation. The defen-

dant shall pay the costs of examination if he is financially able. The determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code. The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(e) If an examination cannot be conducted by reason of the unwillingness of the defendant to cooperate with either a court-appointed examiner or with any state expert, the examiner or expert shall so advise the court in writing and include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental retardation. The court may consider the defendant's lack of cooperation for its effect on the credibility of the defendant's mental retardation claim.

(3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed. The jury shall not be informed of the mental retardation hearing or the court's findings concerning the defendant's claim of mental retardation.

(4) In the event of a conviction of first-degree murder of a person who has been found to be mentally retarded pursuant to subsections (2) and (3) of this section, a special sentencing proceeding shall be held promptly to determine whether the state has proven beyond a reasonable doubt the existence of any of the statutory aggravating circumstances set forth in subsections 19-2515(9) (a) through (j), Idaho Code.

(a) The special sentencing proceeding shall be conducted before a jury unless a jury is waived by the defendant with the consent of the prosecuting attorney.

(i) If the defendant's guilt was determined by a jury verdict, the same jury shall hear the special sentencing proceeding; provided however, that if it is impracticable to reconvene the same jury to hear the special sentencing proceeding due to an insufficient number of jurors, the trial court may dismiss that jury and convene a new jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code.

(ii) If the defendant's guilt was determined by a plea of guilty or by a decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including, but not limited to, a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code, unless such jury is waived.

(iii) If a special sentencing proceeding is conducted before a newly impaneled jury, the state and the defense may present evidence to inform the jury of the nature and circumstances of the murder for which the defendant was convicted. The newly impaneled jury shall be instructed that the defendant has previously been found guilty of first-degree murder and that the jury's purpose is limited to making findings relevant for sentencing.

(b) At the special sentencing proceeding, the state and the defendant shall be entitled to present all evidence relevant to the determination of

whether or not a statutory aggravating circumstance has been proven beyond a reasonable doubt. Disclosure of evidence to be relied on in the sentencing proceeding shall be made in accordance with Idaho criminal rule 16. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing.

(c) If a unanimous jury, or the court if a jury is waived, finds the existence of a statutory aggravating circumstance beyond a reasonable doubt, the court shall impose a fixed life sentence. If a unanimous jury, or the court if a jury is waived, does not find the existence of a statutory aggravating circumstance beyond a reasonable doubt, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the defendant shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service.

(5) Nothing in this section is intended to alter the application of any rule of evidence or limit or extend the right of any party to assert any claim or defense otherwise available to that party.

(6) Any remedy available by post-conviction procedure or habeas corpus shall be pursued according to the procedures and time limits set forth in section 19-2719, Idaho Code. [I.C., § 19-2515A, as added by 2003, ch. 136, § 4, p.394.]

Compiler's notes. Section 6 of S.L. 2003, ch. 136 declared an emergency. Approved March 27, 2003.

Sec. to sec. ref. This section is referred to in §§ 18-4004 and 19-2126.

19-2516. Inquiry into circumstances — Examination of witnesses. [Repealed.]

Compiler's notes. This section, which comprised R.S., R.C., & C.L., § 7993; C.S., § 9037; I.C.A., § 19-2416, was repealed by S.L. 1995, ch. 140, § 2, effective July 1, 1995.

19-2517. Imprisonment upon failure to pay fine. [Repealed.]

Compiler's notes. Former § 19-2517, which comprised Cr. Prac. 1864, § 447; R.S., § 7994; am. 1899, p. 379, § 1; reen. R.C. & C.L., § 7994; C.S., § 9038; I.C.A., § 19-2417; am. 1957, ch. 10, § 1, p. 13, was repealed by S.L. 1994, ch. 142, § 1, effective July 1, 1994.

19-2518. Lien of judgment for fine. — A judgment that the defendant pay a fine, pay costs, or pay fine and costs, constitutes a lien in like manner as a judgment for money in a civil action. [Cr. Prac. 1864, § 448; R.S., § 7995; 1899, p. 379, § 2; reen. R.C. & C.L., § 7995; C.S., § 9039; I.C.A., § 19-2418.]

Cited in: State v. Anderson, 31 Idaho 514, 174 P. 124 (1918); State v. Montroy, 37 Idaho 684, 217 P. 611 (1923).

19-2519. Entry of judgment — Record. — (a) When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction was had and must

without unnecessary delay annex together and file the following papers, which constitute a record of the action:

1. A copy of the minutes of a challenge interposed by the defendant to the panel of a grand jury, or to an individual grand juror, and the proceedings and the decisions thereon.
2. The indictment and copy of the minutes of the plea or demurrer.
3. A copy of the minutes of a challenge interposed to the panel of the trial jury or to an individual juror, and the proceedings and decision thereon.
4. A copy of the minutes of the trial.
5. A copy of the minutes of the judgment.
6. Any bill or bills of exceptions.
7. The written charges asked of the court, and refused with the court's endorsement thereon.
8. A copy of all requested instruction showing those given and those refused with the court's endorsement thereon, together with a copy of all instructions given on the court's own motion.

(b) As soon as possible upon entry of the judgment of conviction the clerk shall deliver to the sheriff of the county a certified copy of the judgment along with a copy of the presentence investigation report, if any, for delivery to the director of correction pursuant to section 20-237, Idaho Code. [Cr. Prac. 1864, § 449; R.S. & R.C., § 7996; am. 1915, ch. 149, p. 323; reen. C.L., § 7996; C.S., § 9040; I.C.A., § 19-2419; am. 1991, ch. 116, § 2, p. 244.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 1 of S.L. 1991, ch. 116 is compiled as § 20-237.

Section 3 of S.L. 1991, ch. 116 declared an emergency. Approved March 27, 1991.

Cross ref. Exceptions unnecessary, I.C.R., Rule 51.

Cited in: State v. Lottridge, 29 Idaho 53, 155 P. 487 (1916); State v. Crawford, 32 Idaho 165, 179 P. 511 (1919); Crossler v. Safeway Stores, 51 Idaho 413, 6 P.2d 151 (1931); State v. Upham, 52 Idaho 340, 14 P.2d 1101 (1932); Dawson v. Eldredge, 89 Idaho 402, 405 P.2d 754 (1965); State v. Salazar, 95 Idaho 305, 507 P.2d 1137 (1973); State v. Chauncey, 97 Idaho 756, 554 P.2d 934 (1976).

ANALYSIS

Appellate review.
Contents of record.
Effect of amendment.
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Appellate Review.

Matter not made a part of the record by statute must be made so by bill of exceptions

in order to be available on appeal. People v. Ah Hop, 1 Idaho 698 (1878). But see I.C.R., Rule 51.

On appeal from the judgment alone, no objection or exception may be considered that does not appear from the record or judgment roll, as defined by this section. State v. Suttles, 13 Idaho 88, 88 P. 238 (1907).

To authorize review of instructions given by court upon its own motion, they must be presented to Supreme Court by a proper bill of exceptions, either incorporating instructions given, or the exception, with a proper identification of such instructions, showing that exception was taken at time instructions were given. State v. Peck, 14 Idaho 712, 95 P. 515 (1908).

Contents of Record.

Instructions given by court on its own motion constitute no part of the record. People v. Walter, 1 Idaho 386 (1871); State v. Suttles, 13 Idaho 88, 88 P. 238 (1907).

Record need not show that officer in charge of jury was sworn, or that jury was admonished at each adjournment. People v. Waters, 1 Idaho 560 (1874).

Neither the arraignment nor a copy of the minutes thereof is a part of the record in criminal action. People v. Ah Hop, 1 Idaho 698 (1878).

Record need not show that defendant was instructed as to his right to challenge an individual juror, as required by § 19-2011,

nor that jury was admonished at each adjournment of court, as required by § 19-2127. *State v. Suttles*, 13 Idaho 88, 88 P. 238 (1907).

Effect of Amendment.

Previous rulings of Supreme Court — that instructions in writing requested by the state, and given, or requested by defendant and refused, are deemed excepted to, and question presented thereby need not be preserved in the bill of exceptions in order to be reviewed by appellate court; also that objections to instructions given by court on its own motion must be preserved by bill of exceptions in order to be reviewed — are not affected by the amendment of 1915. *State v. Lundhigh*, 30 Idaho 365, 164 P. 690 (1917), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 160 (1937).

Failure to Make Record.

The receiving of defendant's plea of guilty

and sentencing him for second degree burglary with no reporter present and the clerk not present made it impossible for the clerk to perform his duty under this section and was such a lack of fairness and deviation from established rules of procedure as to necessitate the conclusion by the Supreme Court that the defendant had not been afforded the protection of the due process clauses of the state and federal constitutions. *Ebersole v. State*, 91 Idaho 630, 428 P.2d 947 (1967).

Instructions.

This section does not require that trial judge serve a copy of instructions on litigants before argument. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

19-2520. Extended sentence for use of firearm or deadly weapon.

— Any person convicted of a violation of sections 18-905 (aggravated assault defined), 18-907 (aggravated battery defined), 18-909 (assault with intent to commit a serious felony defined), 18-911 (battery with intent to commit a serious felony defined), 18-1401 (burglary defined), 18-1508(3), 18-1508(4), 18-1508(5), 18-1508(6) (lewd conduct with minor or child under sixteen), 18-2501 (rescuing prisoners), 18-2505 (escape by one charged with or convicted of a felony), 18-2506 (escape by one charged with or convicted of a misdemeanor), 18-4003 (degrees of murder), 18-4006 (manslaughter), 18-4015 (assault with intent to murder), 18-4501 (kidnapping defined), 18-5001 (mayhem defined), 18-6101 (rape defined), 18-6501 (robbery defined), 37-2732(a) (delivery, manufacture or possession of a controlled substance with intent to deliver) or 37-2732B (trafficking), Idaho Code, who displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing or attempting to commit the crime, shall be sentenced to an extended term of imprisonment. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years.

For the purposes of this section, "firearm" means any deadly weapon capable of ejecting or propelling one or more projectiles by the action of any explosive or combustible propellant, and includes unloaded firearms and firearms which are inoperable but which can readily be rendered operable.

The additional terms provided in this section shall not be imposed unless the fact of displaying, using, threatening, or attempting to use a firearm or other deadly weapon while committing the crime is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at the trial of the substantive crime; provided, however, that the prosecutor shall give notice to the defendant of intent to seek an enhanced penalty at or before the preliminary hearing or before a waiver of the preliminary hearing, if any.

This section shall apply even in those cases where the use of a firearm is an element of the offense. [I.C., § 19-2520, as added by 1977, ch. 10, § 1, p. 20; am. 1980, ch. 296, § 1, p. 767; am. 1983, ch. 183, § 1, p. 496; am. 1986, ch. 319, § 2, p. 784; am. 1988, ch. 328, § 1, p. 990; am. 1993, ch. 264, § 1, p. 896.]

Compiler's notes. Section 18-1508 is referred to in this section as §§ 18-1508(3), 18-1508(4), 18-1508(5), and 18-1508(6); however, § 18-1508 is not divided into subsections but consists of only one paragraph.

The words in parentheses so appeared in the law as enacted.

Section 1 of S.L. 1986, ch. 319 contains a repeal and § 3 is compiled as § 19-2520B.

Section 2 of S.L. 1980, ch. 296 declared an emergency. Approved April 1, 1980.

Sec. to sec. ref. This section is referred to in §§ 19-2520E, 19-2905.

Cited in: *State v. Seifart*, 100 Idaho 317, 597 P.2d 44 (1979); *State v. Bylarna*, 103 Idaho 472, 649 P.2d 1228 (Ct. App. 1982); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982); *State v. Hoffman*, 104 Idaho 510, 660 P.2d 1353 (1983); *State v. Ziegler*, 107 Idaho 1133, 695 P.2d 1272 (Ct. App. 1985); *State v. Valdez-Abrejo*, 108 Idaho 79, 696 P.2d 930 (Ct. App. 1985); *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); *State v. McKaughen*, 108 Idaho 471, 700 P.2d 93 (Ct. App. 1985); *State v. Stedtfeld*, 108 Idaho 695, 701 P.2d 315 (Ct. App. 1985); *State v. Carlson*, 108 Idaho 859, 702 P.2d 897 (Ct. App. 1985); *State v. Merrifield*, 109 Idaho 11, 704 P.2d 343 (Ct. App. 1985); *State v. Wheeler*, 109 Idaho 795, 711 P.2d 741 (Ct. App. 1985); *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987); *Stedtfeld v. State*, 114 Idaho 273, 755 P.2d 1311 (Ct. App. 1988); *State v. Campbell*, 114 Idaho 367, 757 P.2d 230 (Ct. App. 1988); *State v. Rhoades*, 119 Idaho 594, 809 P.2d 455 (1991); *State v. Bryant*, 127 Idaho 24, 896 P.2d 350 (Ct. App. 1995); *State v. Medina*, 128 Idaho 19, 909 P.2d 637 (Ct. App. 1996); *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996); *State v. Hudson*, 129 Idaho 478, 927 P.2d 451 (Ct. App. 1996); *State v. Santana*, 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000); *State v. Alsanea*, 138 Idaho 733, 69 P.3d 153 (Ct. App. 2003).

ANALYSIS

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Aggravated Assault.

The legislature clearly intended that the punishment for aggravated assault committed with a firearm be subject to the enhancement provisions of this section; therefore, § 18-301 (now repealed) did not prohibit the enhanced sentence of a five-year consecutive term under this section where defendant used a firearm in the commission of aggravated assault. *State v. Metzgar*, 109 Idaho 732, 710 P.2d 642 (Ct. App. 1985).

Aggravated Battery.

The legislature clearly intended the enhancement provision of this section to apply to aggravated battery committed with a firearm. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Appellate Review.

The underlying sentence and enhancement sentence are viewed as one continuous sentence with two distinct segments; each segment should be separately set forth in the judgment so that each component of the sentence can be judicially reviewed. *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

Burglary.

Where the evidence showed that a shot was fired after defendant and another person attempted to escape after entering a victim's barn, there was sufficient evidence that defendant displayed, used, threatened, or attempted to use a firearm while committing or attempting to commit a burglary. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Concurrent Indeterminate Sentence.

Fifteen year concurrent indeterminate sentences with a five-year indeterminate enhancement for use of a deadly weapon were not excessive when imposed on a defendant who pled guilty to second-degree kidnapping and aggravated battery even though the defendant had no prior record when considering the brutal nature of the crimes. *State v. Fink*, 107 Idaho 1031, 695 P.2d 416 (Ct. App. 1985).

Constitutionality.

This section is not an unconstitutional violation of the doctrine of separation of powers since it does not by its terms make the carrying of a firearm during a felony a separate felony, does not fix a mandatory sentence for such additional crime and does not remove the sentencing court's authority under § 19-2601 to commute, suspend or withhold a sentence. *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981).

This section does not violate the constitutional guarantee against double jeopardy by providing for multiple penalties for the same offense, but rather it provides for a single more severe penalty when an offense is committed with a deadly weapon; accordingly, where the trial court sentenced the defendant to two five-year concurrent terms for two robberies and then imposed an additional three-year term, to be served consecutively, for the defendant's use of a firearm during the crimes, the penalty actually imposed upon the defendant did not violate the double jeopardy prohibition and was well within the limits intended by the legislature in this section. *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983).

This section, which imposes an additional prison term for committing certain crimes while using a firearm, does not unconstitutionally violate the right to bear arms as embodied in Const. Art. 1, § 11, nor does it impermissibly infringe upon the constitutional separation of legislative and judicial functions embodied in Const. Art. 2, § 1. *State v. Grob*, 107 Idaho 496, 690 P.2d 951 (Ct. App. 1984).

Where aggravated assault involved a firearm, the enhancement of defendant's sentence for using a firearm did not violate his constitutional right against double jeopardy; the Idaho legislature intended that certain crimes, when committed with a firearm,

should receive greater penalties than if no firearm had been used. *State v. Metzgar*, 109 Idaho 732, 710 P.2d 642 (Ct. App. 1985).

Charging defendant with firearm enhancement did not violate his due process because the language of this section is sufficiently explicit to put people on notice that if they commit attempted murder in some degree by using a deadly weapon, they will be subject to the penalties therein. *State v. Herrera-Brito*, 131 Idaho 383, 957 P.2d 1099 (Ct. App. 1998).

Construction.

This section and § 19-2520A (repealed) plainly overlapped since both provided for increased punishment of an offender who uses or threatens to use a firearm while committing certain felonies. However, § 19-2520A (repealed) contained a reconciling clause; it provided that the additional penalty under § 19-2520A (repealed) was "substituted for" the penalty under this section when both statutes applied. It logically follows that this section may be applied where § 19-2520A (repealed) is deemed to be inapplicable. *State v. Evans*, 107 Idaho 429, 690 P.2d 364 (Ct. App. 1984).

This section does not define a separate substantive offense, but rather, provides for a single, more severe penalty when an offense is committed with a firearm; it has been construed to mean that the underlying sentence and the enhancement sentence are to be viewed as one continuous sentence with two distinct segments. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

I.C. § 19-2520E, by its wording, limits the otherwise mandatory duty of the district court to enhance "multiple" sentences under this section. *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987).

Phrase "in the perpetration of" a crime in Idaho Code § 18-4003(d) is synonymous with the words "while committing" a crime in Idaho Code § 19-2520. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Construction With § 19-2520E.

This section provides for an enhanced penalty if a person commits a crime using a firearm, but provides that any person convicted of two or more substantive crimes that arose out of the same indivisible course of conduct is only subject to one enhanced penalty. *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001).

Conviction of Attempt.

Attempted robbery is not one of the enumerated offenses under this section, nor is there any inference that conviction of attempt of the listed offenses comes within the provisions of this statute; accordingly, the enhancement provisions of the section could not be

imposed on a sentence given for conviction of an attempted robbery in which a deadly weapon was used. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

Deterrence.

General deterrence is a sufficient basis for imposition of a period of incarceration. *State v. Allison*, 112 Idaho 572, 733 P.2d 793 (Ct. App. 1987).

Discretion of Court.

Where, even though defendant's criminal record was clean during the years immediately preceding the crimes charged, he had previously been convicted of multiple felony and misdemeanor charges, had been incarcerated numerous times and suffered from an uncontrollable alcohol problem, and where his crime was of a violent nature, involving the firing of some 16 rounds at two police officers and defendant's mother, there was no abuse of discretion in imposing maximum five year sentence for each of two counts of assault with a deadly weapon and an additional five years under this section. *State v. Olsen*, 103 Idaho 278, 647 P.2d 734 (1982) (Decided under law prior to 1980 amendment).

Sentences imposed on defendant convicted on first-degree murder and use of firearm in murder, totaling 30 years, were within the statutory maximum that could have been imposed and were not an abuse of discretion. *State v. Camarillo*, 106 Idaho 310, 678 P.2d 102 (Ct. App. 1984).

Where the defendant was sentenced to an indeterminate sentence of 20 years for robbery under § 18-6503, enhanced by ten consecutive years for use of a firearm under this section, such sentencing was within the statutory limits and did not constitute an abuse of discretion where the defendant's prior record consisted of misdemeanors, the defendant subsequently pled guilty to a charge of robbery, psychological evaluations had shown an inability to perceive socially appropriate behavior or the consequences of his actions and one evaluation had diagnosed him as psychopathic, and the defendant showed no remorse for the robbery. *State v. Stedtfeld*, 108 Idaho 695, 701 P.2d 315 (Ct. App. 1985).

Double Punishment.

Imposing a five-year sentence for robbery under § 18-6503, and an additional consecutive three-year term under this section because the defendant used a firearm, did not violate § 18-301 (now repealed), which prohibits double punishment where a single act results in the commission of two or more crimes, since the robbery was the only crime committed. *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983).

The consideration of defendant's use of a firearm both in arriving at the underlying

manslaughter sentence and in adding to that sentence pursuant to this section did not punish him twice for the same behavior; in effect, the legislature has elected to fix two different penalties for the crime of manslaughter — a lesser penalty where the crime was committed without the use of a deadly weapon, and a greater one where a deadly weapon was involved. *State v. Dallas*, 109 Idaho 670, 710 P.2d 580 (1985).

Enhancement of Life Sentence.

A defendant sentenced to an indeterminate life sentence plus an additional term for use of a firearm, said sentences to be served consecutively, must serve the indeterminate life sentence until paroled or pardoned, at which time he or she must immediately begin serving the firearm sentence until paroled, pardoned, or discharged. *State v. Kaiser*, 108 Idaho 17, 696 P.2d 868 (1985).

The defendant's indeterminate life term for the murder and "consecutive" indeterminate ten-year term for the use of a firearm was not erroneous; the sentence imposed by the court had to be treated as a single sentence composed of an indeterminate life term enhanced by an indeterminate ten-year period under this section. *State v. Saykhamchone*, 112 Idaho 1128, 739 P.2d 427 (Ct. App. 1987).

Since an enhancement must share the same fixed or indeterminate characteristics as the sentence imposed for the underlying crime, the enhancement imposed for use of a deadly weapon had to be deemed an indeterminate term as a ten-year extension to the indeterminate life sentence imposed for robbery. *State v. Searcy*, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

Enhancement of Sentence.

Where in sentencing defendant the district court pronounced "consecutive" sentences, one for the robbery and one for use of a firearm, rather than imposing the firearm sentence as an "enhancement" of the robbery sentence, this did not render the aggregate sentence illegal or invalid. *Lopez v. State*, 116 Idaho 705, 779 P.2d 19 (Ct. App. 1989).

When the language in the written judgment of conviction was considered in light of the oral declarations made by the court at the time the sentences for manslaughter convictions were pronounced, it was clear that the judge understood that the sentence relating to the use of a firearm, to be served consecutively to the manslaughter convictions, was not for a separate crime resulting in an independent conviction but instead served the purpose only of permitting an enhancement to one of the sentences imposed for manslaughter. The sentencing court's effort to separately state the length of the enhancement term of ten years was consistent with a previous expression by the Court of Appeals

that the underlying sentence and the enhancement sentence can be viewed as one continuous sentence with two distinct segments. *State v. Dallas*, 126 Idaho 273, 882 P.2d 440 (Ct. App. 1994).

There was error in imposing sentence enhancements for use of a deadly weapon in defendant's convictions for involuntary manslaughter and aggravated battery because three of defendant's crimes arose out of the same indivisible course of conduct, and therefore, he was only subject to one enhanced penalty. *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001).

Evidence.

Circumstantial evidence may be used to prove that a firearm was operable. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Where statements and testimony at trial of both eyewitness and the defendant clearly established that the murder of victim was because of an ongoing longstanding hatred of victim by defendant, aggravated most recently by victim's advances toward witness, whom defendant considered to be his girl, and that it was only after victim had been mortally shot and stabbed, and after defendant had dragged him off to a hiding place in the sagebrush, that as an afterthought, he determined to take victim's wallet and motorcycle, and more of his personal belongings, the trial court was amply justified in sentencing defendant upon the premise that the acts of murder and robbery were divisible, rather than indivisible, and accordingly, did not violate the provisions of § 19-2520E in imposing a separate enhancement on each sentence. *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987).

Firearm.

The circumstances were more than adequate to support an inference that the defendant displayed a "firearm" during the incident at the convenience store, where the defendant was arrested shortly after a robbery had been reported at the convenience store, a .44 Magnum Smith & Wesson pistol, loaded with hollow-point bullets, was found in his vehicle, a store clerk identified the defendant as the robber and testified that he had pointed a gun toward her, she said that the pistol in evidence "looked like" the gun the defendant had displayed and that the defendant cocked the gun and threatened to "blow [her] head off" if she did not give him the money in a cash drawer, and a police officer examined the pistol in evidence and testified that it appeared to be operable. *State v. Olin*, 111 Idaho 516, 725 P.2d 801 (Ct. App. 1986), mod'f, 112 Idaho 673, 735 P.2d 984 (1987).

—Circumstantial Evidence.

A jury may infer from circumstantial evidence that a weapon displayed during com-

mission of a crime was a "firearm" within the meaning of this section. *State v. Olin*, 111 Idaho 516, 725 P.2d 801 (Ct. App. 1986), mod'f, 112 Idaho 673, 735 P.2d 984 (1987).

Circumstantial evidence such as an explicit threat by an individual to fire a weapon is sufficient to enable a jury to reasonably infer that a gun could be fired. *State v. Cates*, 117 Idaho 90, 785 P.2d 654 (Ct. App. 1989), cert. denied, 117 Idaho 372, 788 P.2d 187 (1990).

—Operability.

Where victim observed gun from a distance of approximately two feet, defendant pointed the gun at victim and victim's roommate while they undressed, defendant opened the cylinder and showed victim that the weapon was loaded and during the assault pulled the hammer back, and defendant at one point told victim's roommate that if he ran away he would "blow his head off," the evidence was sufficient to allow the jury to reasonably conclude that the gun was operable. *State v. Metzgar*, 109 Idaho 732, 710 P.2d 642 (Ct. App. 1985).

Where a supermarket employee, who observed the firearm allegedly used by the defendant in the robbery, described the firearm as a revolver with a six to eight inch barrel, another store employee and a customer both testified that the defendant was armed with a firearm, and two of the witnesses testified that the defendant pointed the revolver at them and told them not to move, the testimony was sufficient for the jury to reasonably infer that the gun was real and operable. *State v. Vega*, 110 Idaho 685, 718 P.2d 598 (Ct. App. 1986).

Where the two motel employees at the scene of the robbery saw a gun, although the defendant made no verbal threats to use it, it was reasonable for the jury to infer that the gun used in the robbery was operable, especially in light of the shooting of the police officer that occurred minutes later. *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

—Testimony of Defendant.

Because for defendant to testify about his knowledge of the operability of the guns used in the commission of the crimes charged would have contradicted his plea of not guilty and his claim of innocence, counsel's failure to put defendant on the stand solely to testify that one of the two guns used in the commission of the crimes was inoperable could not be held to be ineffective. *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996).

—Use Essential Element of Crime.

Where the use of a firearm or deadly weapon is an essential element of the crime for which a defendant is charged and he is found guilty, the jury has already made its

factual determination as to whether the particular weapon has been used, and the judge need not submit the issue to the jury for a special finding to determine whether a firearm or deadly weapon was used. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

—Use Nonessential Element of Crime.

In cases where use of a firearm or deadly weapon is not an essential element of the crime charged, this section requires both a separate allegation in the pleadings and a separate findings by the trier of fact that such a weapon was used. *State v. Hernandez*, 120 Idaho 653, 818 P.2d 768 (Ct. App. 1991).

Information.

Where the information filed against the defendant contained two counts, both of which clearly and unequivocally accused him of the crime of robbery and set forth the essential facts of the crimes, including the specific allegation that the defendant used a pistol in the commission of the crimes, the information did not violate the defendant's due process rights merely because it did not specifically state the prosecution's intention to seek an enhanced sentence under this section since this section does not create a substantive offense. *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983).

Because notice provided by count III of the information charged in 1982 burglary met the pre-1983 pleading standards of this section and satisfied due process concerns, counsel could not be found ineffective for not requesting more specifics about the enhancement allegation in the information. *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996).

In General.

This section does not prescribe a new offense, but provides only for the imposition of additional punishment upon conviction of an offense in which a firearm was used. *State v. Smith*, 103 Idaho 135, 645 P.2d 369 (1982).

This section does not define or create a separate offense, but is merely a sentence enhancing statute that comes into play after a defendant is convicted of one of the enumerated offenses. *State v. Galaviz*, 104 Idaho 328, 658 P.2d 999 (Ct. App. 1983).

Any conflict between § 18-301 (now repealed), relating to acts punishable in different ways and double jeopardy, and this section must be resolved in favor of this section, it being the more recent, special statute. *State v. Metzgar*, 109 Idaho 732, 710 P.2d 642 (Ct. App. 1985).

This section does not limit the power of the Commission of Pardons and Parole. *State v. Merrifield*, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

This section does not prescribe a new of-

fense, and it imposes an additional term instead of an additional sentence. *State v. Merrifield*, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

Instructions.

Instruction that jury must determine whether or not the defendant carried, displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime, adequately informed the jury of element necessary to convict the defendant of possession charge, and there was sufficient competent evidence upon which to base a finding of actual possession by the defendant. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984).

District court should not have instructed the jury on the firearm enhancement by defining a firearm consistent with the definition of a deadly weapon in the aggravated assault statute, Idaho Code § 18-905. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Judgment.

—Correction.

Where the trial court's judgment labeled an "order of commitment," recited that the defendant was convicted, upon a guilty plea, of "armed robbery," when, in reality, the defendant was found guilty of robbery after a jury trial, the judgment had to be corrected to state simply that the defendant was convicted, upon a jury verdict, of robbery. *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

Notice of Intent.

—Mandatory.

The notice requirement of intent to seek an enhanced penalty is a mandatory condition to the use of this section. *State v. Pardo*, 109 Idaho 1036, 712 P.2d 737 (Ct. App. 1985).

—Oral Notice Sufficient.

Idaho Criminal Rule 12(c) only requires that notice which is already in writing and is to be filed with the court meet certain requirements, and thus an oral notice of the state's intent to seek an enhanced penalty for the use of a deadly weapon was sufficient to satisfy the notice requirements as set forth in this section. *Medina v. State*, 132 Idaho 722, 979 P.2d 124 (Ct. App. 1999).

Sentence Not Upheld.

A firearm penalty must share the same fixed or indeterminate characteristic as the rest of the sentence imposed for the underlying crime; therefore, a defendant may not be sentenced to an indeterminate life sentence enhanced by a consecutive fixed period for the use of a firearm. *State v. Merrifield*, 112 Idaho 365, 732 P.2d 334 (Ct. App. 1987).

Sentence Upheld.

Considering that defendant's attack upon victim was an unprovoked, execution-style attempt to take a human life that only fortuitously was unsuccessful and that defendant denied that he had any mental disease or needed treatment, fixed life sentence for robbery and fixed 15-year sentence for battery, enhanced by an additional 15 years for use of a firearm, was justified to protect society. *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

The district court did not err in sentencing the defendant to a 15-year indeterminate sentence for the use of a firearm in the commission of the robbery pursuant to this section, which was to run consecutive to the indeterminate life sentence imposed for the robbery. *State v. Langley*, 110 Idaho 895, 719 P.2d 1155, cert. denied, 479 U.S. 861, 107 S. Ct. 210, 93 L. Ed. 2d 140 (1986).

In prosecution for robbery, the sentence of an indeterminate twelve-year term, enhanced by three years because of the use of a firearm, was consistent with this section. *State v. Vega*, 113 Idaho 756, 747 P.2d 778 (Ct. App. 1987) (decision prior to 1986 amendment).

Where in addition to the serious and violent nature of the robbery, the record disclosed that defendant had five prior felony convictions and had served several terms of imprisonment, the district judge did not abuse his discretion in imposing a ten-year indeterminate sentence for robbery, enhanced by a 15-year indeterminate period for use of a firearm during the robbery. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Where a defendant was convicted of robbery as well as first degree murder, a single ten-year enhancement on the robbery conviction was justified notwithstanding the fact that he was sentenced to a fixed life sentence with no possibility of parole. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993); 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991).

The court did not impose an excessively harsh sentence when it sentenced defendant to concurrent life terms plus 15 years, with a minimum of 25 years in prison on each charge of rape, robbery, kidnapping, and the use of a firearm. *State v. Wolverton*, 120 Idaho 559, 817 P.2d 1083 (Ct. App. 1991).

Defendant admitted to forcing a girl's car off the road, threatening her and stabbing her several times in the back before she freed herself from him; pursuant to an amended information charging him with aggravated battery with an enhancement for the use of a weapon, a sentence of 30 years, with ten years fixed was not an abuse of discretion. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

This section specifically provides that a person convicted of certain enumerated felonies "who displayed, used, threatened, or attempted to use a firearm or other deadly weapon while committing the crime, shall be sentenced to an extended term of imprisonment" and where the trial court followed the explicit language of this section, there was not error. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

The district judge believed that any further reduction in sentence would depreciate the seriousness of the defendant's crime, namely, shooting a pistol at police officers chasing him on foot; regardless of defendant's current institutional adjustment, rehabilitation goals, and conditions at the penitentiary, the reasoning of the judge in denying the Idaho Criminal Rule 35 motion indicated no abuse of discretion. *State v. White*, 121 Idaho 876, 828 P.2d 905 (Ct. App. 1992).

Supreme Court in review of denial of Rule 35 motion did not abuse its discretion in not reducing sentence of fifteen years for aggravated battery plus a consecutive enhancement of twelve years, where the sentence imposed was within the statutory maximums, where the crime committed involved an act of domestic violence which caused life-threatening harm to defendant's former wife and was committed in the presence of their 14-year-old son, where although alcohol was a factor it could not be used as defense to excuse the actions, where there was no provocation for the attack which was a result of an ongoing cycle of domestic violence that escalated over the years, where the victim impact statement disclosed a long history of abuse and terror directed at former wife by defendant, where protection of victim and son were viewed as a paramount concern, and where defendant presented no evidence of any serious rehabilitation effort on his part. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

The maximum sentence for the crime to which defendant was found guilty, including the enhancement for using a firearm, was thirty years; therefore, defendant had the burden of showing a clear abuse of discretion by the trial court in sentencing him. *State v. Morrison*, 130 Idaho 85, 936 P.2d 1327 (1997).

There was no abuse of discretion in giving defendant the maximum sentence where the sentencing court was permitted to consider the defendant's alleged criminal conduct for which he had not been convicted or for which charges had been dismissed, and the record demonstrated that the district court took into account the overriding sentencing goal of the protection of society and appropriately concluded that defendant presented a grave

threat of reoffense if he were not imprisoned. *State v. Thomas*, 133 Idaho 800, 992 P.2d 795 (Ct. App. 1999).

The defendant bears the burden to show that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. Therefore, defendant's sentence was not unduly harsh where defendant had previously been given an opportunity for rehabilitation through the retained jurisdiction but continued his criminal behavior, did not accept responsibility for his conduct, and continued to assert his innocence in the present case and also denied the stabbing for which he had previously been convicted. *State v. Harrison*, 136 Idaho 504, 37 P.3d 1 (Ct. App. 2001).

In defendant's murder case, a court did not err by denying defendant's motion for postconviction relief where defendant's sentence was legal because the requirement that defendant's use of a firearm be specifically found was satisfied. *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

Severity of Sentence.

Where the defendant, upon his conviction of voluntary manslaughter, received a sentence of an indeterminate period not exceeding six years, for shooting to death his son-in-law who had entered his home drunk and threatened the father-in-law, the sentence was not too harsh despite the defendant's advanced age, declining physical condition, and lack of a prior criminal record, because probation would not measure up to the severity of the offense of intentionally taking another's life. *State v. Baker*, 103 Idaho 43, 644 P.2d 365 (Ct. App. 1982).

Where defendant received five-year sentence for robbery enhanced by three-year sentence for use of firearm, which sentences were within the statutory maximums, and where such sentences were suspended and defendant placed on probation, but defendant subsequently violated probation, the reimposition of the balance of the sentence, including the enhanced portion, was not excessive. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Where defendant had a previous conviction for armed robbery and used a firearm in the commission of second armed robbery and where the district court explained its reasons for the total sentence, noting that it reflected the severity of the crime while still allowing appellant the opportunity to straighten out his life, court did not err in sentencing defendant to indeterminate terms of ten years for robbery and three years for use of firearm. *State v. Mallery*, 105 Idaho 352, 670 P.2d 57 (Ct. App. 1983).

Defendant's sentences for attempted robbery and aggravated battery were not excessive nor represented an abuse of discretion where trial judge imposed maximum concurrent sentences, 15 years, for each crime and where defendant used a firearm in committing aggravated battery, the court extended the aggravated battery sentence for an additional 15 years, as permitted by this section; for each crime the sentencing judge specified that the minimum term of confinement would be the entire length of the sentence and under these sentences defendant must spend 30 years in confinement without the possibility of parole. *State v. Sanchez*, 115 Idaho 394, 766 P.2d 1275 (Ct. App. 1988).

Where defendant had an extensive criminal record, where it was apparent that some of his previous criminal behavior involved violence and he had before violated law regarding use of firearms and demonstrated that he seemed to be drawn toward criminal behavior and where district judge noted that defendant had almost no prospects for rehabilitation, that he had violated probation in the past and it was, in fact, only a day after his release from jail that the present offenses occurred, it was reasonable to conclude that serious risk of harm to the public might result absent a lengthy period of incarceration and, therefore, sentence that would result in ten years incarceration was not unreasonable in light of sentencing goals which include: retribution, rehabilitation, deterrence and the protection of society. *State v. Arledge*, 119 Idaho 584, 808 P.2d 1329 (Ct. App. 1991).

Uncharged acts.

Since a sentencing court may, with due caution, consider the existence of a defendant's alleged criminal activity for which no charges have been filed or where charges have been dismissed, there was no error in sentencing court's determination of the significance to be placed on victim's account of defendant's prior, uncharged criminal acts against her. *State v. Wickel*, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994).

Unified Sentence.

Where the defendant was sentenced to a ten-year indeterminate period for robbery, enhanced by a 15-year indeterminate period, pursuant to this section, for use of a firearm during the robbery, and the judgment specified that the enhancement would run consecutive to the robbery term for a total term of 25, the sentence would be administered as a unified 25-year indeterminate sentence even though the term "consecutive" was used. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (Ct. App. 1988).

Untimely Notice of Appeal.

Where the notice of appeal was filed after the order revoking probation was entered and

more than one year from the date of the original sentence, the appellate court was without jurisdiction to entertain the question of whether the district court could lawfully enhance the sentence under this section. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

User of Firearm.

Only the person who actually used the gun can be subjected to the enhancement provisions. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

Prior to the 1983 amendment of this section, it was not necessary for the state to include a separate count in the information alleging that the defendant used a firearm; thus, where the information specifically, although not separately, alleged that the defendant used a firearm in the commission of the robbery, the defendant was given sufficient notice of the state's intent to seek an enhanced sentence under this section. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984) (decision under section prior to 1983 amendment).

The requirement that the trier of fact must find the defendant used a firearm applied to this section prior to the 1983 amendment; thus, where the jury returned a general verdict of guilty of the crime of robbery, but made no specific finding that the defendant used a firearm, the three-year sentence enhancement for use of a firearm was invalid. *State v. Baruth*, 107 Idaho 651, 691 P.2d 1266 (Ct. App. 1984) (decision under section prior to 1983 amendment).

Vacation of Enhancement Sentence.

Where defendant was charged with use of a deadly weapon in such a way that the jury

could find a deadly weapon was used in committing either battery without specifying in which one of the batteries the knife was used and a separate single enhancement sentence was imposed to run consecutive to both battery sentences, the enhancement sentence could be vacated without the need to remand for resentencing on the two battery counts, because the single enhancement sentence was not imposed as a part of either battery sentence. *State v. Pardo*, 109 Idaho 1036, 712 P.2d 737 (Ct. App. 1985).

Vacation of Total Sentence.

Where defendant was originally sentenced to a 12-year indeterminate term for murder in the second degree, together with a consecutive indeterminate two-year period for use of a firearm, defendant's sentence was originally enhanced by two years, not the required three years; therefore, the sentence was in violation of this section and illegal. And as a sentence enhanced by this section remains one sentence, the total sentence would be vacated and remanded to the district court. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Opinions of Attorney General. As to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

19-2520A. Mandatory minimum sentences. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 19-2520A, as added by 1979, ch. 315, § 1, p. 849; am. 1983, ch. 183,

§ 2, p. 496, was repealed by S.L. 1986, ch. 319, § 1.

19-2520B. Infliction of great bodily injury — Attempted felony or conspiracy — Extension of prison term. — (1) Any person who inflicts great bodily injury, and the injury was either intended or the act causing the injury was done with a reckless disregard for the safety of another person, on any person, other than an accomplice, in the commission or attempted commission of a felony or conspiracy to commit such a felony shall be sentenced to an extended term sentence. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by twenty (20) years. A term of imprisonment shall be extended as provided in this section unless infliction of great bodily injury is an element of the offense of which he is found guilty.

(2) As used in this section, "great bodily injury" means a significant or substantial physical injury.

(3) The extended term of imprisonment required by this section shall apply to any aider or abettor; a person who acts in concert with, or a person who conspires with, the perpetrator of the crime.

(4) The additional terms provided in this section shall not be imposed unless the fact of great bodily injury is separately charged in the accusatory pleading and admitted by the accused or found to be true by the trier of fact after a verdict or finding of guilty on the substantive crime. [I.C., § 19-2520B, as added by 1981, ch. 150, § 1, p. 260; am. 1983, ch. 183, § 3, p. 496; am. 1986, ch. 319, § 3, p. 784.]

Effect of 1986 Act. Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 19-2520C or 19-2520D, Idaho Code."

Compiler's notes. Section 2 of S.L. 1986, ch. 319 is compiled as § 19-2520.

Sec. to sec. ref. This section is referred to in §§ 18-4631 and 19-2520E.

Cited in: State v. Kaiser, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984).

Enhancement of Sentence.

There was a material question of fact con-

cerning whether the defendant's plea was involuntary because he did not understand the consequences of his plea, where when the defendant entered his plea of guilty he was not informed that any enhancement of the sentence was possible or would be sought by the prosecutor, and when the court commenced the sentencing hearing two weeks later, it attempted to inform the defendant about determinate time under this section but the explanation, as reported in the record, was anything but clear. Noel v. State, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987).

Where "infliction of great bodily injury" was an essential element of manslaughter, it could not also be used for sentence enhancement, because the language found in this section indicates that the legislature did not intend for the elements constituting a crime to be used a second time to impose a harsher sentence on a defendant. State v. Elison, 135 Idaho 546, 21 P.3d 483 (2001).

19-2520C. Extension of prison terms for repeated sex offenses, extortion and kidnapping. — (1) Any person who is found guilty of violation of the provisions of sections 18-2401 (extortion), 18-4501 (kidnapping), 18-6101 (rape), 18-6605 (crime against nature), or 18-1508 (lewd and lascivious conduct), Idaho Code, or any attempt or conspiracy to commit such crime(s); and committed such crime(s) by force, violence, duress, menace or threat of great bodily injury and who has been previously found guilty of any such crime, shall be sentenced to an extended term sentence. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years; provided, however, that no extension shall be imposed under this section for any such crime occurring prior to a period of fifteen (15) years during which the person remained free of prison custody, parole and being found guilty of a crime which is a felony; provided further that no extension shall be imposed under this subsection when the provisions of section 19-2520B, Idaho Code, would be applicable.

(2) Any person found guilty of an offense specified in subsection (1) of this section who has served two (2) or more prior prison terms for any crime specified in subsection (1) hereof, shall be sentenced to an extended term sentence. The extended term of imprisonment authorized in this section shall be computed by increasing the maximum sentence authorized for the crime for which the person was convicted by twenty (20) years; provided, that no extended term of imprisonment shall be imposed under this subsection for any prison term served prior to a period of fifteen (15) years during which the person remained free of prison custody, parole and being found guilty of a crime which is a felony.

(3) The extended terms of imprisonment required by this section shall apply to any aider or abettor; a person who acts in concert with, or a person who conspires with, the perpetrator of the crime.

(4) Any extended term of imprisonment required by this section shall not be imposed unless the fact of the prior commission of a crime is separately charged in the accusatory pleading and admitted by the accused or found to be true by the trier of fact after a verdict or finding of guilty on the substantive crime. [I.C., § 19-2520C, as added by 1981, ch. 150, § 2, p. 260; am. 1983, ch. 183, § 4, p. 496; am. 1984, ch. 63, § 3, p. 112; am. 1986, ch. 319, § 4, p. 784.]

Effect of 1986 Act. Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520,

19-2520A, 19-2520B, 19-2520C or 19-2520D, Idaho Code."

Compiler's notes. The words in parentheses so appeared in the law as enacted.

Section 5 of S.L. 1983, ch. 183 is compiled as § 19-2520E.

Section 2 of S.L. 1984, ch. 63 is compiled as § 18-1508.

Sec. to sec. ref. This section is referred to in § 19-2520E.

Cited in: State v. Kaiser, 106 Idaho 501, 681 P.2d 594 (Ct. App. 1984).

19-2520D. Prior foreign conviction. — Every person who has been found guilty in any other state, country or jurisdiction of an offense for which, if committed within this state, such person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if such prior conviction had taken place in a court of this state. [I.C., § 19-2520D, as added by 1981, ch. 150, § 3, p. 260.]

Effect of 1986 Act. Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of

the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 19-2520C or 19-2520D, Idaho Code."

19-2520E. Multiple enhanced penalties prohibited. — Notwithstanding the enhanced penalty provisions in sections 19-2520, 19-2520A,

19-2520B and 19-2520C, Idaho Code, any person convicted of two (2) or more substantive crimes provided for in the above code sections, which crimes arose out of the same indivisible course of conduct, may only be subject to one (1) enhanced penalty. [I.C., § 19-2520E, as added by 1983, ch. 183, § 5, p. 496.]

Compiler's notes. Section 19-2520A, referred to in this section, has been repealed.

Section 4 of S.L. 1983, ch. 183 is compiled as § 19-2520C.

ANALYSIS

Construction.

Construction with § 19-2520.

Correction of invalid sentence.

Offenses divisible.

Construction.

This section, by its wording, limits the otherwise mandatory duty of the district court to enhance "multiple" sentences under I.C. § 19-2520. *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987).

Construction With § 19-2520.

Section 19-2520 provides for an enhanced penalty if a person commits a crime using a firearm, but this section limits the scope of § 19-2520 by providing that any person convicted of two or more substantive crimes that arose out of the same indivisible course of conduct is only subject to one enhanced penalty. *State v. Custodio*, 136 Idaho 197, 30 P.3d 975 (Ct. App. 2001).

District court erred in dismissing one firearm enhancement in a case where the State sought to impose an enhancement on two different charges arising out of the same incident; the State was allowed to charge more than one enhancement, but defendant was only subject to one enhancement at sen-

tencing. *State v. McLeskey*, 138 Idaho 691, 69 P.3d 111 (2003).

Correction of Invalid Sentence.

The original sentence imposed on defendant which contained two separate enhancements, was invalid since it violated this section, and the trial court could not correct the sentence without the defendant being present. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993); 120 Idaho 882, 820 P.2d 1239 (Ct. App. 1991).

Offenses Divisible.

Where statements and testimony at trial of both eyewitness and the defendant clearly established that the murder of victim was because of an ongoing longstanding hatred of victim by defendant, aggravated most recently by victim's advances toward witness, whom defendant considered to be his girl, and that it was only after victim had been mortally shot and stabbed, and after defendant had dragged him off to a hiding place in the sagebrush, that as an afterthought, he determined to take victim's wallet and motorcycle, and more of his personal belongings, the trial court was amply justified in sentencing defendant upon the premise that the acts of murder and robbery were divisible, rather than indivisible, and accordingly, did not violate the provisions of this section in imposing a separate enhancement on each sentence. *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987).

19-2520F. Consecutive sentences for felonies committed in correctional facilities. — Every person who has been found guilty of a commission of a felony on the grounds of a correctional facility located in this state shall have the sentence for such offense begin after all previous sentences have ended. [I.C., § 19-2520F, as added by 1990, ch. 238, § 1, p. 676.]

19-2520G. Mandatory minimum sentencing. — (1) Pursuant to section 13, article V of the Idaho constitution, the legislature intends to provide mandatory minimum sentences for repeat offenders who have previously been found guilty of or pleaded guilty to child sexual abuse. The legislature hereby finds and declares that the sexual exploitation of children constitutes a wrongful invasion of a child and results in social, developmental and emotional injury to the child. It is the policy of the legislature to protect children from the physical and psychological damage caused by their being used in sexual conduct. In order to protect children from becoming

victims of this type of conduct by perpetrators, it is necessary to provide the mandatory minimum sentencing format contained in subsection (2) of this section. By enacting mandatory minimum sentences, the legislature does not seek to limit the court's power to impose in any case a longer sentence as provided by law.

(2) Any person who is found guilty of violating the provisions of section 18-1506 (sexual abuse of a child under age sixteen years), 18-1508 (lewd conduct with a minor under sixteen), or 18-1508A, Idaho Code (sexual battery of a minor child sixteen or seventeen years of age), or any attempt or conspiracy to commit such a crime, shall be sentenced to a mandatory minimum term of confinement to the custody of the state board of correction for a period of not less than five (5) years, if it is found by the trier of fact that previous to the commission of such crime the defendant has been found guilty of or has pleaded guilty to a violation of any such crime or an offense committed in another state which, if committed in this state, would be punishable pursuant to any of the sections of the Idaho Code identified in this subsection.

(3) The mandatory minimum term provided in this section shall be imposed where the aggravating factor is separately charged in the information or indictment and admitted by the accused or found to be true by the trier of fact at a trial of the substantive crime. A court shall not have the power to suspend, withhold, retain jurisdiction, or commute a mandatory minimum sentence imposed pursuant to this section. Any sentence imposed under the provisions of this section shall run consecutive to any other sentence imposed by the court. [I.C., § 19-2520G, as added by 1993, ch. 152, § 1, p. 387.]

Compiler's notes. The words in parentheses so appeared in the law as enacted.

19-2521. Criteria for placing defendant on probation or imposing imprisonment. — (1) The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that imprisonment is appropriate for protection of the public because:

- (a) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
- (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (c) A lesser sentence will depreciate the seriousness of the defendant's crime; or
- (d) Imprisonment will provide appropriate punishment and deterrent to the defendant; or
- (e) Imprisonment will provide an appropriate deterrent for other persons in the community; or
- (f) The defendant is a multiple offender or professional criminal.

(2) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of avoiding a sentence of imprisonment:

- (a) The defendant's criminal conduct neither caused nor threatened harm;
- (b) The defendant did not contemplate that his criminal conduct would cause or threaten harm;
- (c) The defendant acted under a strong provocation;
- (d) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
- (e) The victim of the defendant's criminal conduct induced or facilitated the commission of the crime;
- (f) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that was sustained; provided, however, nothing in this section shall prevent the appropriate use of imprisonment and restitution in combination;
- (g) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
- (h) The defendant's criminal conduct was the result of circumstances unlikely to recur;
- (i) The character and attitudes of the defendant indicate that the commission of another crime is unlikely.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the court may place the defendant on probation if the supervision, guidance, assistance or direction is needed that the probation service has the resources to provide. [I.C., § 19-2520, as added by 1977, ch. 46, § 1, p. 85; am. and redesisg. 1993, ch. 86, § 1, p. 215; am. and redesisg. 1993, ch. 101, § 1, p. 254.]

Compiler's notes. This section was added by the legislature as § 19-2520 in S.L.1977, ch. 46, § 1. However, previously the legislature had added a § 19-2520 in S.L.1977, ch. 10, § 1. S.L. 1993, ch. 86, § 1 and ch. 101, § 1 changed the section designation from § "19-2520" to § "19-2521."

This section was amended by two 1993 acts — ch. 86, § 1 and ch. 101, § 1, both effective July 1, 1993 — which do not appear to conflict and have been compiled together.

The amendment by ch. 86, § 1, amended the code section number from "19-2520" to "19-2521"; in subdivision (2)(d) substituted "though" for "through" preceding "failing to establish"; in subdivision (2)(e) substituted "the" for "it's" preceding "commission"; and at the end of subdivision (2)(e) added "of the crime".

The amendment by ch. 101, § 1, amended the code section number from "19-2520" to "19-2521"; and near the end of subsection (3) substituted "has the resources to" for "can" preceding "provide."

Section 2 of S.L. 1993, ch. 101 is compiled as § 20-219.

Cited in: *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983); *State v. Beltran*, 109 Idaho 196, 706 P.2d 85 (Ct. App. 1985); *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987); *State v. Cline*, 113 Idaho 90, 741 P.2d 377 (Ct. App. 1987); *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987); *State v. Griffith*, 114 Idaho 95, 753 P.2d 831 (Ct. App. 1988); *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988); *State v. Robison*, 119 Idaho 890, 811 P.2d 500 (Ct. App. 1991); *State v. Chapman*, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991), *aff'd*, 121 Idaho 351, 825 P.2d 74 (1992); *State v. Joy*, 120 Idaho 690, 819 P.2d 108 (Ct. App. 1991); *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991); *State v. Soto*, 121 Idaho 53, 822 P.2d 572 (Ct. App. 1991); *State v. Nelson*, 121 Idaho 141, 823 P.2d 175 (Ct. App. 1991); *State v. Bianchi*, 121 Idaho 766, 828 P.2d 329 (Ct. App. 1992); *State v. Kerrigan*, 123 Idaho 508, 849 P.2d 969 (Ct. App. 1993); *State v. Down-*

ing, 128 Idaho 149, 911 P.2d 145 (Ct. App. 1996); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (1998); *State v. Daniels*, 134 Idaho 896, 11 P.3d 1114 (2000).

ANALYSIS

Denial of probation.
Deterrence.
Discretion of court.
Evidence.
Evidence considered.
Matters considered.
Purpose.
Recitation of criteria by court.
Reconsideration of criteria.
Relinquishment of jurisdiction.
Requirement of treatment program before probation.
Revocation of probation.
Scope of review.
Sentence supported.
Sentence unreasonable.
Severity of sentence.
Sex-related offenses.
White collar crimes.

Denial of Probation.

A trial court's refusal to retain jurisdiction under subdivision 4. of § 19-2601, for further evaluation of a defendant, will not be deemed a clear abuse of discretion if the trial court already has sufficient information to determine that a suspended sentence and probation would be inappropriate under this section. Where the trial judge was informed that the defendant had committed the crime in question while on probation from a court in Oregon and had committed two misdemeanors while the instant case was pending, the district court had sufficient information to deny probation in conformity with this section and the court's refusal to retain jurisdiction, for further evaluation, would not be disturbed on appeal. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

Where during the 120-day period in which the trial court retained jurisdiction following the defendant's plea of guilty to a robbery charge, the court determined that due to the defendant's alcohol abuse problem and his prior criminal record, probation for the defendant was not feasible, the trial court did not abuse its discretion when it relinquished its jurisdiction in favor of a 15-year term of imprisonment. *State v. Turner*, 105 Idaho 748, 672 P.2d 1078 (Ct. App. 1983).

A decision to deny probation will not be reversed absent an abuse of discretion. *State v. Bowman*, 106 Idaho 446, 680 P.2d 868 (Ct. App. 1984).

Although the court's refusal to grant a withheld judgment could prevent the defendant from continuing his employment in the banking industry, the district court did not

abuse its sentencing discretion by refusing to grant a withheld judgment, where the defendant had repeatedly schemed over a period of time to defraud several persons and firms of large sums of money, and he had obtained another highly responsible position with a bank without disclosing to his present employer the true nature and extent of his criminal acts in this action. *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986).

In prosecution for vehicular manslaughter, the trial court did not abuse its discretion in concluding that imprisonment, rather than probation, was necessary in the defendant's case, where his background suggested a high risk of recurrence if he were placed on probation, even if treatment for alcoholism was ordered. *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986).

Where the defendant committed grand theft while under the influence of alcohol, the court did not abuse its discretion in imposing a sentence of imprisonment rather than probation, where the defendant failed to demonstrate an ability to control his drinking propensities and he never completed the alcohol treatment program, the district court could reasonably view the chances for successful probation as slim, the indeterminate sentence of imprisonment would permit the defendant to benefit from prison programs for alcohol abusers, and it offered him the incentive of possible parole. *State v. Hathaway*, 111 Idaho 844, 727 P.2d 1272 (Ct. App. 1986).

The court did not abuse its discretion in refusing to suspend a six-month sentence for violation of § 18-1501, where the violation constituted neglect resulting in a child's death, and due consideration was given to the criteria of this section. *State v. Staten*, 114 Idaho 925, 762 P.2d 838 (Ct. App. 1988).

In prosecution for forcible rape, the district court did not abuse its discretion in failing to find the defendant a worthy candidate for probation where evidence was presented tending to inculcate the defendant in the making of a telephone call to his sister, who was a close friend of the young victim, allegedly threatening violence toward the sister and toward the victim. *State v. Carman*, 114 Idaho 791, 760 P.2d 1207 (Ct. App. 1988), *aff'd*, 116 Idaho 190, 774 P.2d 900 (1989).

Denial of probation will not be viewed as a clear abuse of discretion if the decision comports with the sentencing criteria articulated in this section. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

Where 34-year-old defendant pled guilty to causing injury to a child under § 18-1501(1) and in the record, the presentence investigation report and transcript of the sentencing hearing defendant was shown to be a person who had rejected discipline, had poor work habits, had been involved in sexual miscon-

duct prior to being charged in this case, was reported in psychological evaluation to have a high risk of re-offense, particularly because of his resistance to treatment for his sexual misconduct, and to be evasive and less than honest and the psychology staff voted to recommend incarceration rather than probation, judge's denial of probation was not erroneous. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

Where defendant who pled guilty to violation of causing injury to children expressed a desire to change but did not manifest that desire into positive steps toward treatment and rehabilitation, denial of probation was proper. *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991).

Generally, a sentencing court's decision to refuse probation will not be deemed an abuse of discretion if the court has sufficient information to determine that probation would be inappropriate. *State v. Amy*, 123 Idaho 287, 846 P.2d 938 (Ct. App. 1992).

Where the court noted that defendant was a person who could be rehabilitated, but that the competing objectives of protecting society, general and special deterrence, and punishment, weighed against granting probation, refusal to grant probation or to retain jurisdiction for further evaluation was not an abuse of discretion. *State v. Salgado*, 123 Idaho 247, 846 P.2d 249 (Ct. App. 1993).

A decision to deny probation will not be held to represent an abuse of discretion if the decision is consistent with this section, which prescribes criteria for weighing probation against a sentence of confinement. *State v. Smith*, 117 Idaho 225, 847 P.2d 265 (Ct. App. 1993).

The trial court's failure to explain why a term of imprisonment was preferable to granting probation was not error. *State v. Casper*, 123 Idaho 796, 853 P.2d 1 (Ct. App. 1993).

In sentencing defendant for lewd conduct with a minor under 16, the trial court properly considered the statutory factors in determining imprisonment was appropriate where defendant was a threat to any teenage girl in his home and was in denial about his conduct; defendant's denial was an obstacle to rehabilitation and a period of only one, two or three years would have understated the severity of his conduct. *State v. Reber*, 138 Idaho 275, 61 P.3d 632 (Ct. App. 2002).

Deterrence.

General deterrence is a sufficient basis for imposition of a period of incarceration. *State v. Allison*, 113 Idaho 572, 733 P.2d 793 (Ct. App. 1987).

Where the district judge found the defendant was not being fully truthful about her involvement with drugs but was minimizing

her drug activities and perceived that the defendant had disregarded orders to appear at court for evaluation, the objectives of general deterrence and rehabilitation as stated in the judge's reasoning satisfied the reasonableness test of the measure of confinement. *State v. Marks*, 119 Idaho 64, 803 P.2d 565 (Ct. App. 1991).

Discretion of Court.

Where the court, at time of sentencing the defendant upon his plea of guilty, simply imposed an identical sentence as that given the same defendant for a similar offense in another county, the court did not abdicate the proper exercise of its discretion by merely replicating the sentence where the record contained the judge's remark that he had considered the criteria in this section, and that he regarded the sentence imposed in the companion case as fair. *State v. Salinas*, 103 Idaho 54, 644 P.2d 376 (Ct. App. 1982).

Where the defendant pled guilty to possession with intent to deliver a nonnarcotic drug or substance and the record adequately demonstrated that the trial judge closely examined the presentence report, considered six letters submitted on defendant's behalf, the facts and circumstances of this offense, the defendant's prior record, the defendant's previous actions and character, rehabilitation prospects, feasibility of probation, and the interest of society, the trial judge did not clearly abuse his discretion in sentencing the defendant to the maximum permissible sentence. *State v. Couch*, 103 Idaho 496, 650 P.2d 638 (1982).

Where the defendant was given an indeterminate sentence of 15 years following his plea of guilty to a charge of rape, the sentence was not excessive and did not represent an abuse of discretion by the sentencing judge, given the defendant's apparent lack of remorse and given the fact that the defendant would first become eligible for parole in five years. The five years' incarceration was not excessive to accomplish the primary objective of protecting society and the secondary goals of deterrence and punishment mentioned by the sentencing judge. *State v. Moore*, 104 Idaho 226, 657 P.2d 1094 (Ct. App. 1983).

Where defendant had been convicted previously of four felonies and six misdemeanors and had been placed on probation three different times, the judge's determination to sentence him to confinement rather than place him on probation was consistent with the criteria set forth in this section, governing the choice between incarceration and probation. *State v. Bowman*, 106 Idaho 446, 680 P.2d 868 (Ct. App. 1984).

The decision whether to grant probation or to impose a sentence of imprisonment is within the discretion of the sentencing court;

its decision to deny probation will not be overturned unless the appellant shows there was a clear abuse of discretion. *State v. Spurgeon*, 107 Idaho 175, 687 P.2d 19 (Ct. App. 1984).

Refusal to retain jurisdiction under subdivision 4. of § 19-2601 will not be deemed a "clear abuse of discretion" if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under this section. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

The court's decision between imprisonment and probation is one of discretion. *State v. Hathaway*, 111 Idaho 844, 727 P.2d 1272 (Ct. App. 1986).

District court did not abuse its discretion by imposing sentence of concurrent, aggregate terms of 12 years, with a minimum of period of confinement of five years without retaining jurisdiction on defendant who pled guilty to two counts of lewd conduct with a minor under 16 where judge considered testimony of witnesses interviewed by the grand jury, the presentence investigation report and defendant's felony record. *State v. Banks*, 119 Idaho 737, 810 P.2d 271 (Ct. App. 1991).

If the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under this section, refusal to retain jurisdiction will not be viewed as an abuse of the court's discretion; similarly, a motion to reduce a legally imposed sentence is addressed to the sound discretion of the court. *State v. Wilcox*, 120 Idaho 139, 814 P.2d 39 (Ct. App. 1991).

A unified sentence of three years with a minimum period of confinement of two years rather than probation, for one count of issuing a closed account check, was not an abuse of discretion where defendant had previously been charged four times with issuing no-account checks, once with the issuance of an insufficient funds check and once for unauthorized use of a bank check. *State v. Domine*, 121 Idaho 887, 828 P.2d 916 (Ct. App. 1992).

The district court did not abuse its discretion when it decided to relinquish its jurisdiction on defendant's lewd conduct offense when it imposed a sentence for defendant's rape conviction without granting him probation on either charge despite the recommendation by the jurisdictional review committee to afford him a probation program. *State v. Smith*, 117 Idaho 225, 847 P.2d 265 (Ct. App. 1993).

The decision to allow probation or whether, instead, to release jurisdiction over the defendant, leaving him to serve his sentence in the custody of the Board of Correction, is a matter within the sound discretion of the sentencing court. The legal standards applicable to this exercise of discretion are contained in this section, which prescribes criteria for weighing

probation against a sentence of confinement. *State v. Urias*, 123 Idaho 751, 852 P.2d 503 (Ct. App. 1993).

The district court did not abuse its discretion by imposing a sentence of five years determinate and 12 years indeterminate where the sentence was based upon the serious nature of the offense and the defendant's history of drug-related offenses and character as established through the presentence investigation and testimony. *State v. Wright*, 134 Idaho 73, 996 P.2d 292 (2000).

The district court did not abuse its sentencing discretion where it reviewed the defendant's drug and criminal history and found the likelihood that the defendant would commit another offense "is a certainty," and where it explained that extending the indeterminate portion of the prosecutor's recommendation was intended to provide some motivation for the defendant to work to rehabilitate himself and that a lesser sentence would depreciate the seriousness of the crime. *State v. Wright*, 134 Idaho 79, 996 P.2d 298 (2000).

Evidence.

The magistrate did not abuse his discretion in requiring the defendant to serve two days incarceration for operating a motor vehicle without liability insurance, where the defendant knew of his licensing status for at least three months prior to the accident, knew the insurance was cancelled because of his licensing status, and knowingly failed to correct the problem until six weeks after the accident. *State v. Allison*, 112 Idaho 572, 733 P.2d 793 (Ct. App. 1987).

Evidence Considered.

In the process of determining whether a grant of probation is appropriate, the trial court necessarily must be permitted to evaluate a broad range of information about the defendant's personality, and very little information about a defendant will be irrelevant to the effort of the law to individualize treatment of convicted persons. *State v. Turner*, 105 Idaho 748, 672 P.2d 1078 (Ct. App. 1983).

A sentencing court is not required to check off or recite each of the criteria of this section for the benefit of the defendant. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

Where prior to announcing its sentence, the trial court issued a detailed statement, touching upon the defendant's youth, his potential for rehabilitation, his prior record, the seriousness of the crime, and the deterrent effect of imprisonment on both the defendant and the community, the trial court gave sufficient consideration to many, if not all, of the criteria of this section. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

Impact on employment is one factor to be considered by any court faced with reasonable

options of outright probation, probation with some incarceration, and imprisonment; it is not necessarily a "critical" factor, as its importance can vary from case to case depending upon other factors. *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986).

The magistrate did not abuse his discretion in requiring the defendant to serve two days incarceration for operating a motor vehicle without liability insurance, where the defendant knew of his licensing status for at least three months prior to the accident, knew the insurance was cancelled because of his licensing status, and knowingly failed to correct the problem until six weeks after the accident. *State v. Allison*, 112 Idaho 572, 733 P.2d 793 (Ct. App. 1987).

While the magistrate failed to explicitly state in the record a point-by-point list of this section's criteria, his statements indicated that due consideration was given, where in his discussion of the sentence and probation, he acknowledged that the defendant was not motivated by malice in the actions that resulted in the death of his daughter but instead by the adherence to unconventional beliefs and health-care treatment methods, that only incarceration could impress upon the defendant the consequences of his beliefs, that the sentence would serve as a deterrent to other persons, the defendant's potential for rehabilitation, and the impact of the sentence upon the defendant's family. *State v. Staten*, 114 Idaho 925, 762 P.2d 838 (Ct. App. 1988).

Where factual circumstances warrant, the sentencing court in a statutory rape case may consider the reasonable belief of an accused regarding the age of the victim as a mitigating factor for purposes of granting probation. *State v. Stiffler*, 114 Idaho 935, 763 P.2d 308 (Ct. App. 1988), *aff'd*, 117 Idaho 405, 788 P.2d 220 (1990).

A sentencing judge is entitled to consider a wide range of relevant evidence when deciding what the appropriate sentence for each defendant should be and it was not improper for the district judge to consider the status of the victim as a charitable organization when evaluating the seriousness of the crime. *State v. Bivens*, 119 Idaho 119, 803 P.2d 1025 (Ct. App. 1991).

Where defendant was convicted of aggravated assault for firing a gun at certain members of his ex-wife's family, a prison sentence rather than placing defendant on probation was appropriate where defendant had a propensity for violence and appeared intrigued with firearms and other deadly weapons, had a misdemeanor conviction for carrying a concealed weapon, and had admitted to the presentence investigator that he had planned to threaten his ex-wife and her family; furthermore, defendant was in need of treatment which could best be provided at a state cor-

rectional institution, and deterrence was also an important consideration upon which the trial court relied in determining to impose a sentence of incarceration rather than probation. *State v. Olson*, 119 Idaho 370, 806 P.2d 963 (Ct. App. 1991).

When determining the appropriate sentence, the court is free under this section to consider a broad range of information on sentencing, and the scope of its inquiry is largely unlimited as to either the type or the source of the information; thus, evidence of an 18-year old conviction, which was offered for its relevance to the determination of an appropriate sentence and not for impeachment, was relevant and admissible in a sentence hearing. *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994).

Matters Considered.

Once a defendant has been placed on probation and thereafter violates his probation, then—depending upon the nature and seriousness of the violation—probation may not be as feasible or desirable as initially thought. Under those circumstances, the utility of the criteria in this section may lessen in significance. *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1989).

Purpose.

The intended purpose of this section is to have a sentencing judge consider certain factors in deciding whether imprisonment or some other alternative is appropriate in a given case. *State v. Brandt*, 109 Idaho 728, 710 P.2d 638 (Ct. App. 1985).

Recitation of Criteria by Court.

The sentencing court need not recite each of the criteria in this section for the benefit of the defendant, the sentencing court need only consider these guidelines prior to making the probation decision. *State v. Cardenas*, 119 Idaho 109, 803 P.2d 1015 (Ct. App. 1991).

There is no requirement that a court recite the statutory criteria in rendering its decision on probation. Nor is the court required to set forth its reasons for imposing a particular sentence. *State v. Martinez*, 122 Idaho 158, 832 P.2d 331 (Ct. App. 1992).

The court's failure to specifically state the aggravating and mitigating factors which it considered in its sentencing determination was not an abuse of discretion because the law does not require a District Court to delineate each factor in this section which it relied upon. *State v. Dowalo*, 122 Idaho 761, 838 P.2d 890 (Ct. App. 1992).

Reconsideration of Criteria.

The trial court is not required to express any reconsideration of each of the criteria of this section every time the question of continuing probation is presented to the sentenc-

ing court. Instead, the actual performance of a defendant under the terms and conditions of his probation presents a better picture of the likelihood of success of continued probation. *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1989).

Relinquishment of Jurisdiction.

Based on presentence reports, the probation violation proceedings, the report from the Jurisdictional Review Committee, and statements of employers and relatives, the District Court did not abuse its discretion in relinquishing jurisdiction. *State v. Rhoades*, 122 Idaho 837, 839 P.2d 1251 (Ct. App. 1992).

Where defendant pled guilty to third degree arson, destroying livestock, burglary, and grand theft, and where defendant had serious behavioral problems, the district court did not abuse its discretion in refusing to retain jurisdiction over defendant since probation was not an appropriate alternative. *State v. Dechenne*, 124 Idaho 11, 855 P.2d 472 (Ct. App. 1993).

If the sentencing court has sufficient information at the time of sentencing to determine that a suspended sentence and probation would be inappropriate under the factors articulated in this section, refusal to retain jurisdiction will not be deemed an abuse of that discretion. *State v. Matthews*, 124 Idaho 806, 864 P.2d 644 (Ct. App. 1993).

Requirement of Treatment Program Before Probation.

Where the defendant had a long history of alcohol abuse and he committed the grand theft while under the influence of alcohol, it was not unreasonable for the court to expect the defendant to successfully complete the alcohol treatment program before being released on probation. *State v. Hathaway*, 111 Idaho 844, 727 P.2d 1272 (Ct. App. 1986).

Revocation of Probation.

Where at his original sentencing hearing, defendant orally accepted the terms of his probation including the condition that a violation of those terms might result in imposition of the original sentence, where two days later, he also signed an "Agreement of Supervision" acknowledging that his failure to abide by and conform to the conditions of supervision might result in the revocation of his probation, and where he admitted to the court that he had violated the terms of his probation, defendant failed to show that the district court abused its discretion by revoking his probation. *State v. Paramore*, 119 Idaho 235, 804 P.2d 1366 (Ct. App. 1991).

The provisions of this section do not govern the court's decision to revoke probation once a probation violation has been proven; the statute applicable to the court's discretionary decision after a defendant has violated proba-

tion is § 20-222. *State v. Drennen*, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992).

Scope of Review.

The task of evaluating the circumstances of a crime, and of a defendant's prior record, is committed to the sentencing court, in the first instance, to determine whether a term of imprisonment should be imposed; the appellate court will not supersede that court's consideration of those factors with its own opinion as to the weight of any individual factor but, rather, it limits its review to whether, under all of the circumstances, the sentencing court abused its discretion in arriving at the sentence imposed. *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983).

The task of evaluating the circumstances of a crime, and of a defendant's prior record, is committed to the sentencing court, in the first instance, to determine whether a term of imprisonment should be imposed; the Court of Appeals will not supersede that court's consideration of those factors with its own opinion as to the weight of any individual factor. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

In seeking to protect the public, the trial court may consider the likelihood that the defendant will commit another crime while on probation. *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986).

Several factors are relevant in deciding whether a particular sentence is reasonable. The primary consideration in sentencing is the good order and protection of society; though humanitarian considerations and rehabilitation are important to society, they cannot be allowed to control or defeat punishment, or to force courts to ignore or subordinate other factors to the detriment of society. *State v. Young*, 119 Idaho 430, 807 P.2d 648 (Ct. App. 1991).

Sentence Supported.

Even if there is a dispute as to some of the reasons given by the court, the remaining, unattacked reasons may be sufficient to support the sentence. *State v. Tisdale*, 107 Idaho 481, 690 P.2d 936 (Ct. App. 1984).

A ten-year indeterminate sentence, with a three-year minimum period of confinement for conviction of lewd and lascivious conduct with a minor under 16 was not excessive given the court's sentencing memorandum which concluded that the defendant was not a proper candidate for probation based upon the pre-sentence report and reports of two sexual therapists. The court also noted that defendant denied any misconduct and such denial would affect his treatment prospects and the defendant intended to return to his home, if put on probation, where two young girls still resided; without proper treatment there would be an undue risk of the defendant

re-offending. *State v. Cliff*, 116 Idaho 921, 782 P.2d 44 (Ct. App. 1989).

Although district judge noted that the defendant had no prior record, had children, and was recently remarried, these factors were outweighed by the fact that her ex-husband, and her friends and acquaintances, used and had dealings with drugs, and the court properly determined that one year of confinement was the best way to keep the defendant from repeating her crime and from being a further threat to the public and to herself. *State v. Marks*, 119 Idaho 64, 803 P.2d 565 (Ct. App. 1991).

Where the court determined that defendant in a grand theft case was lying and imposed a sentence of seven years indeterminate with two and one-third years to be the probable term of confinement to punish him for his crime and to protect society, and the judge's comments on defendant's itinerant lifestyle, lack of employment, and lack of connection to the area reflect the court's concern that defendant would not be a good probation risk, the sentence was reasonable under the circumstances of this case. *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Defendant's sentences for grand theft were not unjust because his codefendants received "lesser" sentences, where defendant had a prior felony record while his codefendants did not. *State v. Westmoreland*, 123 Idaho 980, 855 P.2d 65 (Ct. App. 1993).

Where defendant was convicted of permitting injury to a child, a unified nine-year sentence, with three years as the minimum period of confinement, was reasonable. *State v. Hostetler*, 124 Idaho 191, 858 P.2d 331 (Ct. App. 1993).

Although record of defendant convicted of second-degree murder and sentenced to unified life sentence with minimum confinement of 30 years showed a good employment history with no prior felonies, it was replete with infractions and misdemeanors representing disdain for the law and showed he carried a gun, had a propensity for violence aggravated by alcohol abuse and did not accept blame for his actions; sentence properly accounted for the senselessness of the act and the objectives of sentencing and was not an abuse of discretion. *State v. Hagedorn*, 129 Idaho 155, 922 P.2d 1081 (Ct. App. 1996).

In prosecution for lewd conduct with a minor under 16, sentence of a 10 year determinate term followed by a 10 year indeterminate term was not excessive where the court expressly considered the criteria for probation or imprisonment and noted that because of defendant's continuing denial of guilt there was not available to the court a reliable psychological evaluation of the risk of reoffense and in absence of such evidence it must guard against the danger defendant would offend

again if placed on probation and also concluded that a lesser sentence would depreciate the seriousness of the crime. *State v. Aspeytia*, 130 Idaho 12, 936 P.2d 210 (Ct. App. 1997).

Sentence Unreasonable.

Three years' minimum incarceration for second degree burglary was unreasonable as the period of time necessary to temporarily protect society from defendant or to accomplish any of the goals of deterrence, rehabilitation or punitive retribution, given the non-violent nature of the crime and the background and character of the defendant. *State v. Casper*, 123 Idaho 796, 853 P.2d 1 (Ct. App. 1993).

Severity of Sentence.

Where the defendant, upon his conviction of voluntary manslaughter, received a sentence of an indeterminate period not exceeding six years, for shooting to death his son-in-law who had entered his home drunk and threatened the father-in-law, the sentence was not too harsh despite the defendant's advanced age, declining physical condition, and lack of a prior criminal record, because probation would not measure up to the severity of the offense of intentionally taking another's life. *State v. Baker*, 103 Idaho 43, 644 P.2d 365 (Ct. App. 1982).

Where the record showed that the trial court considered the criteria set forth in this section in choosing imprisonment rather than probation, and the sentences could reasonably be viewed as necessary to protect society and to achieve one or more of the related goals of deterrence, retribution and rehabilitation, the defendant's four concurrent indeterminate sentences of not to exceed 15 years for a kidnapping, two robberies, and a burglary were not excessive. *State v. Spurgeon*, 107 Idaho 173, 687 P.2d 17 (Ct. App. 1984).

Because the trial judge gave sound reasons for the sentence imposed and because his retained jurisdiction would enable him to modify the sentence in the event the proposed rehabilitative measures were not followed, the defendant's sentence of an indeterminate term of four years for aggravated battery was not excessive. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

Sex-Related Offenses.

The court's refusal to grant probation to a defendant convicted of lewd conduct with a minor was consistent with the standards set forth in this section where the defendant had already molested four children and where the evaluating committee informed the court of defendant's potential to re-offend. *State v. Landreth*, 118 Idaho 613, 798 P.2d 458 (Ct. App. 1990).

Where the sentencing judge properly con-

sidered the sentencing criteria and expressed a well-founded concern regarding the need to protect society from defendant's pedophilic tendencies, the sentences imposed on defendant for two counts of lewd conduct with a child under the age of sixteen were not unreasonable. *State v. Fluery*, 123 Idaho 9, 843 P.2d 159 (Ct. App. 1992).

White Collar Crimes.

The courts can, and should, recognize a distinction between violent and nonviolent offenses when considering whether to impose sentences of imprisonment. But the label "white collar crime" does not, by itself, immu-

nize an offender from a penalty of confinement; when such crimes cause serious hardship for the victims or reflect a fundamental disregard for the law, a substantial period of incarceration may be appropriate. Thus, where the defendant was adjudicated a persistent violator and had engaged in a lifestyle of dishonesty, an indeterminate sentence of 18 years was not an abuse of sentencing discretion. *State v. Harrison*, 108 Idaho 324, 699 P.2d 30 (Ct. App. 1985).

Collateral References. Downward departure under state sentencing guidelines based on extraordinary family circumstances. 106 A.L.R.5th 377.

19-2522. Examination of defendant for evidence of mental condition — Appointment of psychiatrists or licensed psychologists — Hospitalization — Reports. — (1) If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least one (1) psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. The costs of examination shall be paid by the defendant if he is financially able. The determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code. The order appointing or requesting the designation of a psychiatrist or licensed psychologist shall specify the issues to be resolved for which the examiner is appointed or designated.

(2) In making such examination, any method may be employed which is accepted by the examiner's profession for the examination of those alleged to be suffering from a mental illness or defect.

(3) The report of the examination shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;
- (c) An analysis of the degree of the defendant's illness or defect and level of functional impairment;
- (d) A consideration of whether treatment is available for the defendant's mental condition;
- (e) An analysis of the relative risks and benefits of treatment or nontreatment;
- (f) A consideration of the risk of danger which the defendant may create for the public if at large.

(4) The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(5) When the defendant wishes to be examined by an expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

(6) Nothing in this section is intended to limit the consideration of other evidence relevant to the imposition of sentence. [I.C., § 19-2522, as added by 1982, ch. 368, § 9, p. 919.]

Compiler's notes. Section 8 of S.L. 1982, ch. 368 is compiled as § 19-2305.

Cross ref. Mental condition not a defense, § 18-207.

Sec. to sec. ref. This section is referred to in § 18-215.

Cited in: *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000); *State v. Coonts*, 137 Idaho 150, 44 P.3d 1205 (Ct. App. 2002).

ANALYSIS

Discretion of court.

—Ordering a second evaluation.

Evaluation required.

Failure to request evaluation.

Ineffective assistance of counsel.

Prejudice.

Purpose.

Sufficiency of evaluation.

Discretion of Court.

The requesting of, and the sufficiency of, a psychological evaluation are matters which are within the trial judge's discretion, absent abuse. *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985).

Court did not err by failing to order psychological evaluation of defendant, *sua sponte*, where there was no evidence that defendant suffered from a mental illness, nor that the condition was a significant sentencing factor. *State v. Adams*, 137 Idaho 275, 47 P.3d 778 (Ct. App. 2002).

—Ordering a Second Evaluation.

Due to a psychological evaluation that provided more information about defendant than the court would have had otherwise, coupled with the presentence report, the court was able to draw a satisfactory picture of the defendant, his history, and his predisposition to sexual abuse; therefore, the court did not abuse its discretion when not ordering a second evaluation. *State v. Hernandez*, 122 Idaho 227, 832 P.2d 1162 (Ct. App. 1992).

Evaluation Required.

The district court was required to obtain an adequate report concerning murder defendant's mental condition before imposing sentence where the record revealed that although defendant had been a juvenile offender, he had no previous history of violence, his sudden escalation from relatively petty crimes to the brutal act committed against his victim, coupled with the incontroverted evidence that defendant suffered from some unspecified mental disability rendering his level of mental functioning and his claimed inability to remember any events from the night of the murder, were circumstances which begged for a psychological evaluation. *State v. McFarland*, 125 Idaho 876, 876 P.2d 158 (Ct. App. 1994).

Where the presentence investigation failed

to meaningfully comply with the provisions of Idaho Crim. R. 32, the district court possessed inadequate information concerning defendant's mental condition at the time of sentencing. *State v. Craner*, 137 Idaho 188, 45 P.3d 844 (Ct. App. 2002).

Failure to Request Evaluation.

Where a defendant fails to request a psychological evaluation or object to a presentence report on the ground that an evaluation has not been performed, he must demonstrate that by failing to order an evaluation the court manifestly disregarded the provisions of I.C.R. 32. *State v. Jones*, 132 Idaho 439, 974 P.2d 85 (Ct. App. 1999).

Ineffective Assistance of Counsel.

Fact that mentally ill defendant's attorney, prior to sentencing, did not request or provide a report satisfying the requirements of this section, did not object to the imposition of sentence without such a report, and did not submit other readily available psychological information that provided a more favorable assessment and prognosis for defendant, raised material issues of fact as to whether defendant received ineffective assistance of counsel. *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998).

Prejudice.

Where defendant requested the court recommend that he receive further evaluation and treatment at the state penitentiary, and the court recommended such treatment, there was no prejudice to defendant by any omission in the order for examination. *State v. Harper*, 129 Idaho 86, 922 P.2d 383 (1996).

Purpose.

The purpose of the psychological report outlined in this section is to assist the district court at sentencing in determining whether to recommend psychological treatment under section 19-2523 during a defendant's confinement probation. *State v. Harper*, 129 Idaho 86, 922 P.2d 383 (1996).

Sufficiency of Evaluation.

Where the psychological evaluation gave merely conclusory statements to the effect that the defendant is an alcoholic with an antisocial personality and violent tendencies, and did not explain upon what tests or procedures these conclusions were based, it tended to reflect only a social interview with the defendant rather than a full-scale psychological evaluation, and this failed to fulfill the intent and spirit of this section. *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985).

A psychological report met the requirements of this section where, although only four pages in length, it presented a case history of the defendant, followed by a discus-

sion of his condition with a final recommendation of incarceration by the reporting psychologist. *State v. Whitehawk*, 116 Idaho 827, 780 P.2d 149 (Ct. App. 1989), *aff'd*, 117 Idaho 1022, 793 P.2d 695 (1990).

Where the record showed that during his pre-trial incarceration, defendant's jailers called for a psychologist when they feared defendant might commit suicide, a review of the report following the psychologist's visit

indicated that her interview of defendant was conducted for the limited purpose of assessing the risk of suicide, and was very brief; the information reflected in that report, though perhaps adequate for the purpose for which it was written, did not supply the in-depth analysis required by subsection (3) of this section, which was vital to the district court's sentencing decision. *State v. McFarland*, 125 Idaho 876, 876 P.2d 158 (Ct. App. 1994).

19-2523. Consideration of mental illness in sentencing. — (1) Evidence of mental condition shall be received, if offered, at the time of sentencing of any person convicted of a crime. In determining the sentence to be imposed in addition to other criteria provided by law, if the defendant's mental condition is a significant factor, the court shall consider such factors as:

- (a) The extent to which the defendant is mentally ill;
- (b) The degree of illness or defect and level of functional impairment;
- (c) The prognosis for improvement or rehabilitation;
- (d) The availability of treatment and level of care required;
- (e) Any risk of danger which the defendant may create for the public, if at large, or the absence of such risk;
- (f) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged.

(2) The court shall authorize treatment during the period of confinement or probation specified in the sentence if, after the sentencing hearing, it concludes by clear and convincing evidence that:

- (a) The defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law;
- (b) Without treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant;
- (c) Treatment is available for such illness or defect;
- (d) The relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment. (of the offense charged.)

(3) In addition to the authorization of treatment, the court shall pronounce sentence as provided by law. [I.C., § 19-2523, as added by 1982, ch. 368, § 10, p. 919.]

Compiler's notes. The words "of the offense charged" in subsection (2)(d) were enclosed in parentheses by the compiler as surplusage.

Section 11 of S.L. 1982, ch. 368 is compiled as § 66-1317.

Section 14 of S.L. 1982, ch. 368 read: "This act shall be in full force and effect and shall apply to persons against whom a criminal complaint is filed on or after July 1, 1982."

Cross ref. Mental condition not a defense, § 18-207.

Sec. to sec. ref. This section is referred to in § 18-207.

Cited in: *State v. Gratiot*, 104 Idaho 782, 663 P.2d 1084 (1983); *State v. Pearson*, 108 Idaho 889, 702 P.2d 927 (Ct. App. 1985); *State v. Desjarlais*, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986); *State v. McDougall*, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988); *State v.*

Furlong, 132 Idaho 526, 975 P.2d 1191 (Ct. App. 1999); *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Ct. App. 2000).

ANALYSIS

Competency.
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Prejudice.
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— Factors.
Sex-related offenses.

Competency.

An individual must be found competent to stand trial under § 18-210. In addition, those individuals who are incapable of forming the necessary intent needed for the crime are protected by the mens rea requirements of I.C. §§ 18-114, 18-115, and 18-207. Finally, those "profoundly or severely retarded" individuals who do not fall under the first two protections and are convicted and who are "wholly lacking capacity to appreciate the wrongfulness of their actions" are protected by the sentencing provisions of this section. *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Court's Discretion.

The court did not abuse its discretion by imposing an indeterminate 16-year sentence on a defendant who pled guilty to lewd conduct with a child under 16, where it was apparent from the record that the court focused upon the defendant's mental impairment, his condition and whether he posed a risk to society; in sentencing, the court emphasized defendant's refusal to admit his involvement in the offense. *State v. Whitehawk*, 116 Idaho 827, 780 P.2d 149 (Ct. App. 1989), aff'd, 117 Idaho 1022, 793 P.2d 695 (1990).

The district court did not err by proceeding with sentencing without the report from the secure mental facility at which defendant was treated from April to July, 1989 where the court had the benefit of evaluations from a psychologist and from the jail psychologist, as well as a recommendation from the presentence investigator. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

Intent to Commit Crime.

The jury's finding that defendant possessed the intent necessary to commit murder was not the finding as to the degree of his capacity to appreciate and conform his conduct required by this section. *State v. Odiaga*, 125

Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Legislative Intent.

By requiring the court to consider the defendant's capacity at sentencing, the legislature necessarily required that the court consider the defendant's capacity to appreciate his or her actions separately from the ability to form the requisite intent to commit the offense. *State v. Odiaga*, 125 Idaho 384, 871 P.2d 801, cert. denied, 513 U.S. 952, 115 S. Ct. 369, 130 L. Ed. 2d 321 (1994).

Post-Conviction Relief.

Although the trial court is required to consider the defendant's mental illness as a sentencing factor, where the defendant's claim that the court failed to apply the factors in this section was ultimately an assertion that his sentence was excessive in light of his mental condition, an issue that could have been raised on direct appeal, the court could not consider it in a post-conviction relief proceeding. *Hollon v. State*, 132 Idaho 573, 976 P.2d 927 (1999).

Prejudice.

Where defendant requested the court recommend that he receive further evaluation and treatment at the state penitentiary, and the court recommended such treatment, there was no prejudice to defendant by any omission in the order for examination. *State v. Harper*, 129 Idaho 86, 922 P.2d 383 (1996).

Pre-Sentence Mental Examination.

The trial court did not err by not ordering a pre-sentence mental examination where there was extensive evidence to support the trial court's conclusion that defendant was competent at sentencing. *State v. Moore*, 126 Idaho 208, 880 P.2d 238 (1994).

Presumption as to Necessity of Treatment.

Where the sentencing court specifically noted that the defendant was using drugs and that his property crimes were related to his drug abuse, the statutory presumption that treatment was necessary imposed no obligation on the court to grant probation in order to facilitate treatment, and the court's refusal of the defendant's request for probation did not mean that the presumption was overlooked or disregarded. *State v. Furlong*, 132 Idaho 526, 975 P.2d 1191 (Ct. App. 1999).

Psychiatric Report.

Where there was reason to believe that defendant's mental condition would be a significant factor in sentencing, the court was required to obtain a report of a psychiatric professional. *State v. King*, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991).

Sentencing.

—Factors.

Where the record demonstrated that the district court adequately considered the substance of the factors suggested in this section in arriving at its sentencing decision, it was not necessary for the court to check off or recite each of the factors enumerated for the benefit of the defendant and defendant's claim that court committed error did not serve as a basis for post-conviction relief. *Fenstermaker v. State*, 128 Idaho 285, 912 P.2d 653 (Ct. App. 1995).

The factors included in this section do not, by themselves, present new information such as would bring them within I.C. 19-4901(a)(4), but rather provide a manner in which to evaluate information that the court already has before it. *Hollon v. State*, 132 Idaho 573, 976 P.2d 927 (1999).

Sex-Related Offenses.

A unified sentence of 15 years, with a 12-year minimum period of confinement for conviction of battery with the intent to commit a serious felony rape, was not excessive where defendant had an extensive criminal record for sex-related offenses and a psychologist's

diagnosis attached to the presentence report indicated that the defendant's psychotic disorders of schizophrenia and "hyper-sexuality" required long-term inpatient rehabilitation and treatment in order to prevent further sexual misconduct. The sentencing court noted that its primary concern was for the protection of society and noted that proper medical treatment would be available during incarceration. *State v. Tillman*, 118 Idaho 617, 798 P.2d 462 (Ct. App. 1990).

Trial court did not abuse its discretion in sentencing defendant, who had pleaded guilty to the crime of sexual abuse of a child under 16 years of age; the trial court considering information in the presentence report and the psychological examination report, the trial court properly placed greater emphasis on the need to protect the community, and the need to punish defendant in an attempt to deter him from committing similar crimes in the future. *State v. Strand*, 137 Idaho 457, 50 P.3d 472 (2002).

Collateral References. Downward departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) based on aberrant behavior. 164 A.L.R. Fed. 61.

CHAPTER 26

SUSPENSION OF JUDGMENT AND SENTENCE AND PAROLE OFFENDERS

SECTION.

- 19-2601. Commutation, suspension, withholding of sentence — Probation.
- 19-2602. Violation of probation — Arrest.
- 19-2603. Pronouncement and execution of judgment after violation of probation.
- 19-2604. Discharge of defendant — Amendment of judgment.

SECTION.

- 19-2605. Powers of judge at chambers.
- 19-2606. Paroled or suspended offender — Duty to report — Order on report.
- 19-2607. Parole secured by misrepresentation.
- 19-2608. Payment of court ordered tests of breath or bodily fluids.

19-2601. Commutation, suspension, withholding of sentence — Probation. — Whenever any person shall have been convicted, or enter a plea of guilty, in any district court of the state of Idaho, of or to any crime against the laws of the state, except those of treason or murder, the court in its discretion, may:

1. Commute the sentence and confine the defendant in the county jail, or, if the defendant is of proper age, commit the defendant to the custody of the state department of juvenile corrections; or
2. Suspend the execution of the judgment at the time of judgment or at any time during the term of a sentence in the county jail and place the defendant on probation under such terms and conditions as it deems necessary and expedient; or
3. Withhold judgment on such terms and for such time as it may prescribe and may place the defendant on probation; or

4. Suspend the execution of the judgment at any time during the first one hundred eighty (180) days of a sentence to the custody of the state board of correction. The court shall retain jurisdiction over the prisoner for the first one hundred eighty (180) days or, if the prisoner is a juvenile, until the juvenile reaches twenty-one (21) years of age. The prisoner will remain committed to the board of correction if not affirmatively placed on probation by the court. Placement on probation shall be under such terms and conditions as the court deems necessary and expedient. The court in its discretion may sentence a defendant to more than one (1) period of retained jurisdiction after a defendant has been placed on probation in a case. In no case shall the board of correction or its agent, the department of correction, be required to hold a hearing of any kind with respect to a recommendation to the court for the grant or denial of probation. Probation is a matter left to the sound discretion of the court. Any recommendation made by the department to the court regarding the prisoner shall be in the nature of an addendum to the presentence report. The board of correction and its agency, the department of correction, and their employees shall not be held financially responsible for damages, injunctive or declaratory relief for any recommendation made to the district court under this section.

5. If the crime involved is a felony and if judgment is withheld as provided in subsection 3. of this section or if judgment and a sentence of custody to the state board of correction is suspended at the time of judgment in accordance with subsection 2. of this section or as provided by subsection 4. of this section and the court shall place the defendant upon probation, it shall be to the board of correction, to a county juvenile probation department, or any other person or persons the court, in its discretion, deems appropriate.

6. If the crime involved is a misdemeanor, indictable or otherwise, or if the court should suspend any remaining portion of a jail sentence already commuted in accordance with subsection 1. of this section, the court, if it grants probation, may place the defendant on probation. If the convicted person is a juvenile held for adult criminal proceedings, the court may order probation under the supervision of the county's juvenile probation department.

7. The period of probation ordered by a court under this section under a conviction or plea of guilty for a misdemeanor, indictable or otherwise, may be for a period of not more than two (2) years; and under a conviction or plea of guilty for a felony the period of probation may be for a period of not more than the maximum period for which the defendant might have been imprisoned. [I.C., § 19-2601, as added by 1972, ch. 336, § 9, p. 844; am. 1972, ch. 381, § 16, p. 1102; am. 1973, ch. 292, § 1, p. 615; am. 1974, ch. 68, § 1, p. 1149; am. 1980, ch. 176, § 1, p. 374; am. 1994, ch. 33, § 1, p. 50; am. 1995, ch. 247, § 1, p. 817; am. 1996, ch. 418, § 1, p. 1388; am. 1998, ch. 67, § 1, p. 260; am. 2000, ch. 246, § 1, p. 686.]

Compiler's notes. Former § 19-2601, comprising S.L. 1915, ch. 104, proviso in § 1, p. 244; reen. C.L., § 7997; am. S.L. 1919, ch. 134, § 1, p. 428; C.S., § 9041; am. S.L. 1929, ch. 97, § 1, p. 204; I.C.A., § 19-2501; am. S.L.

1943, ch. 14, § 1, p. 43; am. S.L. 1947, ch. 79, § 1, p. 129; am. S.L. 1949, ch. 117, § 1, p. 211; am. S.L. 1957, ch. 156, § 1, p. 266; am. S.L. 1970, ch. 143, § 3, p. 425; am. S.L. 1971, ch. 97, § 1, p. 210, was repealed by S.L. 1971, ch.

143, § 5, effective January 1, 1972, and was reenacted by S.L. 1972, ch. 336, § 9, effective April 1, 1972.

Section 8 of S.L. 1972, ch. 336, is compiled as §§ 19-2104 — 19-2109, 19-2111 — 19-2114, 19-2116, and § 10 is compiled as § 19-3403.

Sections 15 and 18 of S.L. 1972, ch. 381 are compiled as §§ 18-7032 and 18-7401, respectively.

Section 2 of S.L. 1973, ch. 292 is compiled as § 19-3921.

Section 2 of S.L. 2000, ch. 246 is compiled as § 20-508.

Section 17 of S.L. 1972, ch. 381 repealed chapters 20, 22, 53, 69 and 71 of title 18 and §§ 18-710, 18-1202, 18-2110, 18-2114, 18-3111, 18-3112, 18-3803, 18-3909, 18-4625, 18-5801, 18-5813, 18-5814 and 18-6408, Idaho Code.

Section 2 of S.L. 1995, ch. 247 declared an emergency. Approved March 20, 1995.

Section 4 of S.L. 2000, ch. 246 provided that the act shall be in full force and effect on and after July 1, 2000.

Cross ref. Sentence and judgment, I.C.R. 33.

Sec. to sec. ref. This chapter is referred to in § 19-2513.

This section is referred to in §§ 18-8004C, 18-8005, 18-8006, 19-2604, 20-508, 20-509 and 67-7035.

Rule to sec. ref. This section is referred to in I.C.R. 54.5, M.C.R. 10, I.A.R. 13(c)(4) and 14.

Cited in: *State v. Trowbridge*, 95 Idaho 640, 516 P.2d 362 (1973); *State v. Cliett*, 96 Idaho 646, 534 P.2d 476 (1975); *State v. Jones*, 98 Idaho 199, 560 P.2d 870 (1977); *State v. Wallace*, 98 Idaho 318, 563 P.2d 42 (1977); *State v. Maki*, 98 Idaho 557, 569 P.2d 361 (1977); *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977); *State v. Adams*, 99 Idaho 75, 577 P.2d 1123 (1978); *State v. Stradley*, 102 Idaho 41, 624 P.2d 949 (1981); *State v. West*, 102 Idaho 562, 633 P.2d 1140 (1981); *State v. Bell*, 103 Idaho 255, 646 P.2d 1026 (Ct. App. 1982); *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982); *State v. Pinson*, 104 Idaho 227, 657 P.2d 1095 (Ct. App. 1983); *State v. Hirshbrunner*, 105 Idaho 168, 667 P.2d 271 (Ct. App. 1983); *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984); *State v. Bingham*, 107 Idaho 501, 690 P.2d 956 (Ct. App. 1984); *State v. Mason*, 107 Idaho 904, 693 P.2d 1106 (Ct. App. 1984); *State v. Kelling*, 108 Idaho 716, 701 P.2d 664 (Ct. App. 1985); *State v. Griffith*, 110 Idaho 613, 716 P.2d 1385 (Ct. App. 1986); *State v. Anderson*, 111 Idaho 121, 721 P.2d 221 (Ct. App. 1986); *State v. Williams*, 112 Idaho 459, 732 P.2d 697 (Ct. App. 1987); *State v. Torres*, 112 Idaho 801, 736 P.2d 853 (Ct. App. 1987); *State v. Liggins*, 113 Idaho 62, 741 P.2d 349 (Ct. App. 1987); *Gawron v. Roberts*, 113 Idaho 330, 743 P.2d

983 (Ct. App. 1987); *State v. Snapp*, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987); *State v. Roy*, 113 Idaho 388, 744 P.2d 116 (Ct. App. 1987); *State v. Elliott*, 113 Idaho 858, 748 P.2d 1388 (Ct. App. 1988); *State v. Swan*, 113 Idaho 859, 748 P.2d 1389 (Ct. App. 1988); *State v. Carman*, 114 Idaho 791, 760 P.2d 1207 (Ct. App. 1988); *State v. Stillwell*, 115 Idaho 127, 765 P.2d 152 (Ct. App. 1988); *State v. Randles*, 115 Idaho 611, 768 P.2d 1344 (Ct. App. 1989); *Dyer v. State*, 115 Idaho 773, 769 P.2d 1145 (Ct. App. 1989); *Ratliff v. State*, 115 Idaho 840, 771 P.2d 61 (Ct. App. 1989); *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1989); *State v. Bartlett*, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990); *State v. Peltier*, 119 Idaho 14, 803 P.2d 202 (Ct. App. 1990); *State v. Hickman*, 119 Idaho 7, 802 P.2d 1219 (Ct. App. 1990); *State v. Caldwell*, 119 Idaho 281, 805 P.2d 487 (Ct. App. 1991); *State v. Wargi*, 119 Idaho 292, 805 P.2d 498 (Ct. App. 1991); *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991); *State v. Prieto*, 120 Idaho 884, 820 P.2d 1241 (Ct. App. 1991); *State v. Rambo*, 121 Idaho 1, 822 P.2d 31 (Ct. App. 1991); *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992); *Stillwell v. State*, 124 Idaho 366, 859 P.2d 964 (Ct. App. 1993), cert. denied, 511 U.S. 1056, 114 S. Ct. 1619, 128 L. Ed. 2d 345 (1994); *State v. Walker*, 126 Idaho 508, 887 P.2d 53 (Ct. App. 1994); *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994); *John v. State*, 129 Idaho 304, 923 P.2d 1011 (Ct. App. 1996); *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996); *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997); *State v. Harrington*, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999); *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000); *State v. Chareunsouk*, 135 Idaho 1, 13 P.3d 1 (Ct. App. 2000); *State v. Knutsen*, 138 Idaho 918, 71 P.3d 1065 (Ct. App. 2003).

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Administrative Segregation.

Denial of inmate's request for writing material, while he was held in administrative segregation awaiting a hearing at which he could rebut the jurisdictional review committee's recommendation to relinquish jurisdiction, was a denial of his due process rights; inmate's only avenue of direct and unfiltered communication with the sentencing court was effectively cut off. *Free v. State*, 125 Idaho 760, 874 P.2d 571 (Ct. App. 1994).

Alternate Sentences.

If a sentence is suspended or lessened or other action taken by the court, after adjudging the defendant guilty, it is not an alternate sentence within the meaning of § 18-111. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

The term "sentence" or "judgment" is not synonymous with "jail", but includes all sanctions, imposed or suspended, by the court, including fine, community service, suspension of driving privileges and restitution to victims. *State v. Josephson*, 124 Idaho 286, 858 P.2d 825 (Ct. App. 1993).

Appeals.

Defendant in accepting commutation of sentence does not waive right of appeal to test the legality of his conviction. *State v. Carpenter*, 67 Idaho 277, 176 P.2d 919 (1947).

Where trial court denied appellant's application for parole, but record is silent as to the grounds of the ruling, the presumption would be that it was founded upon a consideration of the merits of appellant's application, and in the absence of an abuse of discretion will be sustained. *State v. Ellis*, 70 Idaho 417, 219 P.2d 953 (1950).

Where no application for probation or parole was made before appeal of sentence upon conviction of first degree burglary and the judgment was affirmed on appeal, the trial court lost its jurisdiction of the subject matter of the appeal and upon remitting was without authority to change its judgment or order entered before the appeal, such district court only having the power to enforce such judgment. *Forbush v. Thatcher*, 78 Idaho 597, 309 P.2d 203 (1957).

A record must be made of the proceedings on an application for clemency and probation, including the ruling thereon of the trial court in the event a review of the ruling is desired; in the absence of such a record it must be presumed that trial court did consider defendant's oral application for clemency made at time of sentencing and his grounds urged therefor. *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960); *State v. Coburn*, 82 Idaho 437, 354 P.2d 751 (1960).

Where defendant filed application for probation or for leniency in sentencing and asked for presentence investigation, but there was no showing that trial court considered the application, the case would be remanded to afford appellant opportunity to make a showing in mitigation of the offense or mitigating circumstances. *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964).

Where defendant's notice of appeal was filed more than forty-two days after order relinquishing jurisdiction was entered, following a period of retained jurisdiction under subsection (4) of this section, and no motion to extend the deadline to appeal was filed, defendant's appeal was not timely under I.A.R. 14 and the Court of Appeals did not have jurisdiction to entertain a direct challenge to the order relinquishing jurisdiction. *State v. Roberts*, 126 Idaho 920, 894 P.2d 153 (Ct. App. 1995).

Defendant's right to appeal from the order withholding judgment was not preserved, and reviewing court did not reach the merits of defendant's argument that the district court erred by failing to order a mental or physical examination or by failing to consider the factors contained in § 19-2521 before placing defendant on probation under the order withholding judgment. *State v. Wilson*, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995).

Application for Clemency.

The former section, giving the trial court power to commute sentences and suspend or

withhold judgment, in its discretion, required that the court, in the exercise of such discretion, hear applications for clemency; therefore, upon remand the trial court was required to afford appellants an opportunity to make showing in support of their application for clemency, to grant or deny the application and again pronounce sentence. *State v. Freeman*, 85 Idaho 339, 379 P.2d 632 (1963).

Commutation of Sentence.

Where trial court has sentenced defendant to a maximum period of 15 years' imprisonment and then commuted such sentence, such action was within the power of the court, but it was lesser sentence of 5 years' imprisonment with credit pronounced by the court for time spent in the county jail, which was erroneous. *State v. Witzel*, 79 Idaho 211, 312 P.2d 1044 (1957).

Under former section, procedure for withholding sentence and placing a defendant on probation was expressly provided for; and, even though confinement in the county jail as a condition of probation was a sentence, it still would have been the only sentence pronounced and, consequently, could not be both a sentence and a commutation of that sentence. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Conditions of Probation.

A condition of probation must be reasonably related to the purpose of probation, rehabilitation. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

A condition of probation impossible of fulfillment is improper. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

Where defendant's conviction of involuntary manslaughter arose out of the operation of a motor vehicle, a condition of probation prohibiting him from driving bore a reasonable relationship to his crime and his rehabilitation, and was not an abuse of discretion. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

Where in lieu of the six-month sentence, the defendant was offered a two-year probation, and the record showed that he chose to accept the conditions of probation rather than the sentence imposed, it was not an abuse of the trial court's discretion to attach the condition that he could not drive any vehicle for the entire probationary period of two years. *State v. Wilson*, 100 Idaho 725, 604 P.2d 739 (1979).

Warrantless search of probationer's residence was not invalid where probationer, as a condition of his probation, had expressly waived his constitutional right to be free from warrantless searches. *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987).

Since persons conditionally released to society have a reduced expectation of privacy,

thereby rendering intrusions by government authorities "reasonable" which otherwise would be unreasonable or invalid under traditional constitutional concepts probation condition which required submission to warrantless searches was not an unreasonable invasion of defendant's 4th Amendment rights especially where defendant made no allegation that his signature and acceptance of the order and conditions of probation were involuntary or done unintelligently. *State v. Gawron*, 112 Idaho 841, 736 P.2d 1295 (1987).

This section does not provide the trial court with authority to impose arbitrary or unreasonable conditions. The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision. Thus, a condition of probation must be reasonably related to the purpose of probation, which is rehabilitation. *State v. Russell*, 122 Idaho 515, 835 P.2d 1326 (Ct. App. 1991), vacated on other grounds, 122 Idaho 488, 835 P.2d 1299 (1992).

Idaho Code § 19-2601 authorized courts to require payment of money as a condition of probation, and to impose a term in the county jail; the defendant was ordered to reimburse the cost of counseling as a condition of probation where the expense was incurred as part of a publicly funded program defendant voluntarily entered in an attempt to resolve the felony charge favorably. *State v. McCool*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 34 (Feb. 26, 2004).

—Credit for Time Served.

Time served as a condition of probation should not be credited against a sentence which is subsequently reinstated. *State v. Peterson*, 121 Idaho 775, 828 P.2d 338 (Ct. App. 1992).

—Sex Offender Evaluation.

A prosecutor's suggestion that the defendant be required to submit to a sex offender evaluation as a condition of probation did not propose a burden beyond that which would normally be expected as a routine component of probation, and the district court did not err in denying the defendant's motion to withdraw his guilty plea. *State v. Potts*, 132 Idaho 865, 979 P.2d 1223 (Ct. App. 1999).

Constitutionality.

The Idaho Rider Program established under this section creates a liberty interest, protected by the Due Process Clause of the Fourteenth Amendment, in a fair and accurate rehabilitation evaluation and report. *Browning v. Vernon*, 44 F.3d 818 (9th Cir. 1995).

Construction.

The court was of the opinion that the former section should be read as originally

enacted containing the word "and" after the words "commute the second" and without the insertion of a comma after such words: under such reading of the section the trial court was without authority to reduce the maximum period of fifteen years to five years' confinement in the penitentiary or to allow credit for time spent in the county jail. *State v. Witzel*, 79 Idaho 211, 312 P.2d 1044 (1957).

To fulfill the intentment of the former statute, the trial court must afford the defendants full opportunity to present evidence in their behalf in mitigation of circumstances or toward those circumstances which may afford an opportunity for rehabilitation whether this be for a lesser term of imprisonment or parole as might otherwise influence the court in passing sentence from the evidence adduced on a trial of a cause. *State v. Freeman*, 85 Idaho 339, 379 P.2d 632 (1963).

A defendant may decline probation when he deems its conditions too onerous, and demand instead that he be sentenced by the court. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Under former section the district court would have jurisdiction to incarcerate the accused in the county jail as a special condition of the probation order. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

The legislature intended the courts to have maximum flexibility to fashion the sentence most appropriate to the individual defendant and this section must be liberally construed. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Idaho Criminal Rule 32(d) implements the court's exercise of the authority granted by this section. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Section 19-2520 simply renders a person convicted of certain felonies liable to punishment in excess of that which might have been imposed upon him had he not used or possessed a firearm in the commission of the crime and it in no way infringes upon the authority of a court to commute, suspend or withhold a sentence as provided by this section. *State v. Cardona*, 102 Idaho 668, 637 P.2d 1164 (1981).

By allowing the court to retain jurisdiction for 180 days after the execution of a sentence has been ordered, subdivision (4) of this section creates an exception to the general rule that the court loses jurisdiction from the moment execution of sentence begins. The statute enables the court and the Board essentially to exercise concurrent authority over the offender for a limited period. *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994).

Contents of Order.

Terms and conditions imposed by court in granting probation must be set forth in the

order. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Failure of trial court to include terms and conditions of probation in order was condemned by Supreme Court, but failure was not fatal where defendant was orally advised as to conditions and terms of probation and defendant admitted that he knew that he had violated one of the conditions imposed by court. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

An order withholding sentence and placing a defendant on probation is not a final judgment, since sentencing is deferred, and is distinguishable from a judgment imposing sentence, which is a final judgment though its execution is suspended. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Defendant's Rights.

A defendant may decline probation, should he consider its terms too onerous, and demand instead to be sentenced by the court. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

In order to insure the reliability and fairness of the conclusions drawn about the defendant's personality in probation proceedings, it is required: (1) that the defendant be afforded a full opportunity to present favorable evidence; (2) that the defendant be afforded a reasonable opportunity to examine all the materials contained in the pre-sentence investigation report; that the defendant be afforded a full opportunity to explain and rebut adverse evidence. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

Where a trial court sentenced a convicted defendant but stayed the sentence for three months and then held a hearing for the defendant to show cause why he should not begin serving his sentence, the defendant was placed in the status of a probationer and was entitled, at the hearing, to all the due process safeguards applied to probation-revocation hearings. *State v. Kerrigan*, 98 Idaho 701, 571 P.2d 762 (1977).

Where a trial court, applying subdivision (4), retained jurisdiction over a convicted and sentenced defendant for 120 days and then relinquished jurisdiction, the court's failure to give him notice and a hearing did not violate his constitutional rights since such relinquishment did not constitute either the imposition of sentence or a revocation of probation. *State v. Ditmars*, 98 Idaho 472, 567 P.2d 17 (1977), cert. denied, 434 U.S. 1088, 98 S. Ct. 1284, 55 L. Ed. 2d 793 (1978).

A defendant has the right to a hearing, with counsel, when he is sentenced, and if he is granted probation, he is entitled to a hearing before the probation can be revoked and a sentence of confinement imposed; however, if he is sentenced to confinement at the outset,

subject to review after additional information has been gathered during a period of retained jurisdiction, he is not entitled to any hearing before the court terminates jurisdiction and orders confinement for the remaining term of the sentence. *Schmidt v. State*, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982).

A defendant is entitled to representation by counsel at sentencing, but not at probation revocation proceedings except when dictated by special circumstances, unless those proceedings are a combined sentencing and probation revocation proceeding; hence, where defendant was sentenced, while represented by counsel, before he was committed to the custody of the board of correction subject to the 120-day period of jurisdiction retained by the court, his appearance before the classification committee was neither a sentencing proceeding nor a probation revocation proceeding, but an information gathering process, including study and evaluation of defendant, for compilation of a recommendatory report to the trial court, and defendant was not entitled to counsel at his classification hearing. *Schmidt v. State*, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982).

Delay in Issuing Warrant.

Where probationer, who disappeared for three years, left state without permission of probation and parole department, filed no further monthly reports and failed to notify probation or police authorities in other states of his status, fact that state did not seek bench warrant until 18 months after probationer's disappearance did not prejudice his ability to answer the probation violation charge and probation violations were not waived. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Determination of Fitness for Probation.

Where a district court's retained jurisdiction has long since terminated, the most effective procedure for redress of a prison evaluation committee's noncompliance with the due process requirements of *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978), with regard to determining fitness for probation, would be to immediately bring the issue to the attention of the sentencing judge, who could promptly address the matter. *McDonald v. State*, 124 Idaho 103, 856 P.2d 893 (Ct. App. 1993).

Discretion of Court.

District court in passing upon application for probation should consider the following: (1) showing as to whether defendant is a first offender, (2) previous character and actions of the defendant, (3) likelihood of defendant abiding by terms of probation, and (4) interest of society. *State v. Mitchell*, 77 Idaho 115, 289 P.2d 315 (1955).

Question as to whether the district court

exercised its discretion in passing on application for probation by the defendant is a question of law reviewable upon appeal. *State v. Mitchell*, 77 Idaho 115, 289 P.2d 315 (1955).

Where the defendant was convicted of involuntary manslaughter as the result of running by a stop sign, but it appeared that he had served two enlistments in the army, had no prior criminal record, was gainfully employed, bore an excellent reputation in the community, was not driving at an unusual rate of speed, was seriously injured, and probation officer made a favorable report, the district court abused its discretion where it refused application for probation, based merely on the verdict of the jury which did not find the defendant guilty of lesser offense of reckless and negligent driving. *State v. Mitchell*, 77 Idaho 115, 289 P.2d 315 (1955).

Refusal of trial court to conduct a presentence investigation of defendant convicted of obtaining money under false pretenses was not erroneous where the defendant made no request for withholding or suspension of the sentence. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

State board of correction did not have the power or authority to increase sentence of defendant from one to five years for conviction of the crime of issuing a check without funds where the district court sentenced the defendant for one year instead of the statutory period of five years, since the district court did not correct the sentence, and the state did not file a motion to correct the sentence or take an appeal from said sentence. *Spanton v. Clapp*, 78 Idaho 234, 299 P.2d 1103 (1956).

Probation is not a matter of right; it may be granted a defendant through exercise of sound discretion by the trial court within the ambit of authority conferred by the legislature. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

The application for probation is not in the form of an application for mitigation of punishment, but an application for the exercise of the law's humane provisions to allow a person an opportunity to become rehabilitated under proper control and supervision and pertain not to the degree of punishment, but to the question of whether the person shall be punished at all. *State v. Gish*, 89 Idaho 334, 404 P.2d 595 (1965).

Probation may be granted or withheld pursuant to a sound, legal exercise of the trial court's judicial discretion, and an exercise of discretion will be upheld if it is based upon reason rather than emotion. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

A trial court did not abuse its discretion in denying an application for probation and imposing a sentence for the possession of marijuana where an accused stated that he might not be able to live up to the conditions of

probation and continued to use marijuana after his arrest. *State v. Kauffman*, 94 Idaho 20, 480 P.2d 614 (1971).

The former section vested the trial court with discretion to grant or refuse an application for probation. *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968); *State v. Ross*, 92 Idaho 709, 449 P.2d 369 (1968), overruled on other grounds, *State v. Hall*, 95 Idaho 110, 504 P.2d 383 (1972).

There was no abuse of discretion where the district court refused defendant probation and instead sentenced him to two years in prison for selling heroin although there was a strong showing of rehabilitation made on his behalf. *State v. Ogata*, 95 Idaho 309, 508 P.2d 141 (1973); *State v. Stanlee*, 96 Idaho 165, 525 P.2d 360 (1974).

After defendant pleaded guilty to statutory rape charge and presentence investigation stated that defendant was fair risk for probation, court's sentence of 15 years' imprisonment was not abuse of discretion when decision was clearly based on reason rather than emotion. *State v. Cornwall*, 95 Idaho 680, 518 P.2d 863 (1974).

Where the defendant who pleaded guilty to robbery had been out of prison only three and a half months before he had committed the robbery and had escaped twice from minimum security confinement, a fifteen-year sentence was not an abuse of the trial court's discretion. *State v. Roderick*, 97 Idaho 82, 540 P.2d 267 (1975).

Where defendant was convicted of delivery and possession of a controlled substance and where a presentence report did not recommend probation, the trial court did not abuse its discretion in not granting probation. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976).

The district court did not abuse its discretion in imposing the indeterminate sentence of not more than three years for delivery of marijuana, where defendant had had numerous brushes with the law prior to the arrest which led to conviction, and although of a relatively minor nature, these gave support to the trial court's decision to deny the defendant probation at the time of sentencing. *State v. Powers*, 100 Idaho 290, 596 P.2d 802 (1979).

The trial court has broad discretion in determining what evidence is to be admitted at the sentencing hearing. Following reception of evidence regarding the possibility of punishment, the punishment or sentence to be imposed by the court is committed to the sound discretion of the court, subject to maximum penalties set forth in the statutes and subject to any required minimum period of incarceration. *Schmidt v. State*, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982).

Where the committee's recommendation,

that jurisdiction be dropped and the defendant be left to serve the remainder of his sentence, included all seven of the staff reports evaluating defendant's behavior during the last sixty days of his stay at the correctional institution and showed the judge that defendant offered no rebuttal or explanatory statements to the adverse reports, the judge did not abuse his discretion in following the committee's recommendation. *State v. Shofner*, 103 Idaho 767, 653 P.2d 1179 (Ct. App. 1982).

Where, during the 120-day period in which the trial court retained jurisdiction following the defendant's plea of guilty to a robbery charge, the court determined that due to the defendant's alcohol abuse problem and his prior criminal record probation for the defendant was not feasible, the trial court did not abuse its discretion when it relinquished its jurisdiction in favor of a 15-year term of imprisonment. *State v. Turner*, 105 Idaho 748, 672 P.2d 1078 (Ct. App. 1983).

In prosecution for attempted rape of a child, where the investigation disclosed that defendant, who was 22 years old when sentenced, had prior convictions for a burglary and two petit larcenies and also had a history of unlawful use and distribution of drugs and alcohol, the imposition of a ten-year indeterminate sentence did not represent an abuse of discretion and the district judge did not abuse his discretion by refusing to retain jurisdiction under subdivision 4 of this section. *State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), *aff'd*, 106 Idaho 665, 682 P.2d 618 (1984).

The decision whether to grant probation or to impose a sentence of imprisonment is within the discretion of the sentencing court; its decision to deny probation will not be overturned unless the appellant shows there was a clear abuse of discretion. *State v. Spurgeon*, 107 Idaho 175, 687 P.2d 19 (Ct. App. 1984).

The choice of probation is committed to the sound discretion of the trial court; the standard of review of sentencing decisions, including those where probation is an issue, is the "clear abuse of discretion" standard. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

A decision not to grant probation or to commute a sentence will be upheld absent an abuse of discretion. *State v. Cline*, 113 Idaho 90, 741 P.2d 377 (Ct. App. 1987).

In prosecution for soliciting a minor under the age of sixteen years to participate in sexual acts, sentence of a unified five and one-half years term of incarceration with two-year minimum term where court retained jurisdiction to allow a period for evaluation of defendant's suitability for probation was not an abuse of discretion where although defen-

dant had no prior criminal record there was evidence that this was not the first instance of defendant's inappropriate conduct with children. *State v. Willard*, 129 Idaho 827, 933 P.2d 116 (Ct. App. 1997).

Due Process of Law.

Idaho's retained jurisdiction program does not provide defendants with a constitutionally protected liberty interest that would require a hearing before jurisdiction is relinquished. *State v. Coassolo*, 136 Idaho 138, 30 P.3d 293 (2001).

Effect of Unauthorized Order.

Where court makes unauthorized order suspending execution of sentence imposed by judgment, such order does not prevent subsequent enforcement of valid portion of sentence at later date. In re Jennings, 46 Idaho 142, 267 P. 227 (1928).

Entry of Judgment.

The sentencing alternatives provided in this section become available to the court after a person has been convicted by a verdict of guilty, or a plea of guilty has been entered, and whether judgment has been formally entered does not affect the availability of the sentencing alternatives provided in this section, however, entry of a judgment is required to implement some of the sentencing alternatives, particularly those provided in subdivisions 1, 2 and 4 of this section. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Hearing.

Trial court's failure to grant defendant a hearing at the time it relinquished jurisdiction under this section did not constitute a denial of due process of law in violation of Const. Art. 1, § 13 and U.S. Constitution amend. XIV. *State v. White*, 107 Idaho 941, 694 P.2d 890 (1985).

A hearing before the trial court is not required as a condition precedent to that court's relinquishing its 120-days retained jurisdiction under subdivision (4) of this section. *State v. Atwood*, 122 Idaho 199, 832 P.2d 1134 (Ct. App. 1992).

A termination of retained jurisdiction is neither an imposition of sentence nor a revocation of a probation and, in that regard, no hearing is required. Thus, a hearing before the trial court is not required as a condition precedent to that court's relinquishing its retained jurisdiction under subsection (4) of this section. *State v. Denny*, 122 Idaho 563, 835 P.2d 1374 (Ct. App. 1992).

—Right to be Present.

An inmate does not have a right to be present during a conference where the North Idaho Correctional Institution committee reviews the inmate's record, considers staff evaluations, and develops a tentative recom-

mendation as to whether the inmate should be placed on probation. *Bradford v. State*, 124 Idaho 788, 864 P.2d 626 (Ct. App. 1993).

Hearsay.

In determining sentence, it was not an abuse of discretion for trial court to consider hearsay evidence bearing on overall personality of defendant in files of the Idaho department of finance, the Washington state insurance commissioner, and the securities and exchange commission. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

Imposition.

A sentence is "imposed" when it is initially pronounced, even though jurisdiction is retained after subsection (4) of this section or the sentence is suspended. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987).

A sentence is "imposed," within the meaning of I.C.R., Rule 35, when it is originally pronounced. The 120-day period for seeking Rule 35 relief runs from that date, not from a subsequent date when jurisdiction retained under subsection (4) of this section is relinquished. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

Matters Considered.

In the process of determining whether a grant of probation is appropriate, the trial court necessarily must be permitted to evaluate a broad range of information about the defendant's personality, and very little information about a defendant will be irrelevant to the effort of the law to individualize treatment of convicted persons. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

In a determination of the appropriateness of a grant of probation, the trial court must consider the defendant's previous character and actions, his prospects for rehabilitation and for abiding by the terms of his probation, and the interests of society; the primary consideration has been stated to be the good order and protection of society. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

Where defendant had withdrawn a guilty plea on a prior charge of burglary, and charge was later withdrawn and expunged from record, it was not error for the court to consider such previous charge in arriving at a proper sentence and denying probation, when such information was voluntarily given to probation officer by defendant and included in pre-sentence report. *State v. Ballard*, 93 Idaho 355, 461 P.2d 250 (1969).

In the process of determining whether a grant of probation is appropriate, the trial court necessarily must be permitted to evaluate a broad range of information about the defendant's personality, and very little information about a defendant will be irrelevant to the effort of the law to individualize treat-

ment of convicted persons. *State v. Turner*, 105 Idaho 748, 672 P.2d 1078 (Ct. App. 1983).

Impact on employment is one factor to be considered by any court faced with reasonable options of outright probation, probation with some incarceration, and imprisonment; it is not necessarily a "critical" factor, as its importance can vary from case to case depending upon other factors. *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986).

The district court did not abuse its discretion in refusing to grant probation or to commute the sentence, where the judge indicated the need to protect society from the defendant's habitual thefts, the unrealistic expectation that probation would be workable, the defendant's inability to maintain employment, and the need to deter him from committing more offenses. *State v. Cline*, 113 Idaho 90, 741 P.2d 377 (Ct. App. 1987).

Persistent Violators.

This section is not intended to apply to habitual criminals or to a class of persons who indicate by their persistency in the commission of crime that nothing short of actual restraint will deter them from committing other offenses. In *re France*, 38 Idaho 627, 224 P. 433 (1924).

Plea Agreements.

Because an agreement to recommend probation encompassed a recognition that there would be an underlying suspended sentence, a prosecutor's recommendation that the suspended sentence be "significant" was not in conflict with his promise to recommend probation with service of two weeks in jail as a condition of the probation. *State v. Potts*, 132 Idaho 865, 979 P.2d 1223 (Ct. App. 1999).

An agreement to recommend a suspended sentence encompasses a recognition that there will be probation; therefore, the prosecutor's request for probation was not a term that was inconsistent with, or even in addition to, the recommendation for a suspended sentence which was an express term of the plea agreement. *State v. Brooke*, 134 Idaho 807, 10 P.3d 756 (Ct. App. 2000).

Plea Agreement Violation.

Prosecutor violated plea agreement in defendant's aggravated battery case where her comments at the sentencing hearing were "fundamentally at odds" with the State's promised sentencing recommendation, which called for leniency, and defendant's sentence was vacated and he was to have been resentenced by different judge. *State v. Jones*, — Idaho —, 77 P.3d 988 (Ct. App. 2003).

Post-conviction relief.

Although it appeared that defendant had little time to prepare for his rebuttal hearing, that he was prevented from making the con-

tacts that may have been necessary for adequate preparation, and that he was denied the opportunity to call witnesses from among the inmates and staff at the North Idaho Correctional Institute (NICI), the district court remedied any flaws that may have existed in this NICI review. Defendant was afforded full opportunity for rebuttal with assistance of counsel, use of the psychological report he desired to have considered, and the opportunity to call witnesses and prevent any relevant evidence. Therefore, denial of post-conviction relief petition was upheld. *Owen v. State*, 130 Idaho 715, 947 P.2d 388 (1997).

Probation.

A defendant may decline probation when he deems its conditions too onerous, and demand instead that he be sentenced by the court. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

An order withholding sentence and placing a defendant on probation is not a final judgment since sentencing is deferred, and is distinguishable from a judgment imposing sentence, which is a final judgment though its execution is suspended. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Probation is not a matter of right; it may be granted the defendant through exercise of sound discretion by the trial court within the ambit of authority conferred by the legislature. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

—Rejection.

District judge acted within his discretion in rejecting probation and sentencing defendant convicted of burglary to a three-year term with a one-year minimum period of incarceration where the judge was unconvinced that defendant comprehended the import of a felony conviction, though he had no significant prior criminal record, and where the judge was concerned with defendant's exhibited recalcitrant attitude, which belied his stated interest in completing his formal education and undergoing counseling. *State v. Riley*, 119 Idaho 216, 804 P.2d 945 (Ct. App. 1991).

Where defendant: (1) had been through the juvenile system for a number of theft and burglary offenses and recurrent substance abuse; (2) at age 21, defendant already had been incarcerated and had been granted probation which he failed to comply with in every respect; and (3) the instant offenses were his sixth and seventh felony offenses and were committed while he was on parole, the district judge had sufficient information on which to deny probation and the judge acted well within the bounds of his discretion in reducing defendant's original sentence but denying probation. *State v. White*, 121 Idaho 876, 828 P.2d 905 (Ct. App. 1992).

Probation Period.

Period of probation can be for maximum period of sentence which can be imposed on defendant, or for a lesser period, but not for a greater period. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

The period of probation may last as long as the maximum period for which defendant might have been imprisoned. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

Normally in instances where the space for designating the period of probation of a defendant convicted of a misdemeanor is left blank, there will be implied a probationary period which runs for the maximum term possible, which is two years under subsection (7) of this section. *State v. Bailey*, 98 Idaho 387, 565 P.2d 580 (1977).

Procedure.

In probation proceedings, if the court hears hostile witnesses, the defendant must be allowed to cross-examine them; on the other hand, the pre-sentence investigation report compiled by a probation or parole officer will contain a great deal of hearsay information, and the court need not allow the defendant to cross-examine all of the sources of such information. It apparently has been thought sufficient that the defendant be permitted to examine the report and to show by means other than cross-examination the unreliability of adverse information or to counterbalance such information by providing affirmative indications of good character. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

A prisoner, as well as the state, has a substantial interest in the fairness of the due process used to determine his status, and the sentencing judge, as well as the convict, needs the full benefit of a procedure designed to paint an accurate rehabilitation picture. *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978).

Where the classification committee gave defendant at least a month's notice of each hearing, defendant was informed that the committee would consider his performance at the institution, particularly his ability to abide by its rules and regulations, on both occasions he was informed of his right to explain or rebut the staff members' reports and to call witnesses in his behalf and on both occasions he chose not to do so, the procedures followed in evaluating the defendant for probation met the basic standards set forth in *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978); *State v. Shofner*, 103 Idaho 767, 653 P.2d 1179 (Ct. App. 1982).

Where in hearing to determine defendant's readiness for probation, the classification committee complied with the procedural guidelines enumerated in *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978), and in recom-

mending that the court should not grant probation the committee did not act capriciously nor ignore the evidence, but based its decision on the evidence before it, the fact that only six staff members instead of nine participated in the final classification hearing did not make the committee's report deficient or deny defendant due process. *State v. Shofner*, 103 Idaho 767, 653 P.2d 1179 (Ct. App. 1982).

Purpose.

Before the enactment of our probation statute (§§ 19-2601 — 19-2607), all persons convicted of a felony were sentenced to and confined in the state penitentiary, where first offenders were placed in close association with hardened criminals, making restoration to the ranks of law abiding citizens very difficult. A cursory examination of our parole statute discloses that it was enacted for the purpose of vesting trial courts with jurisdiction, in proper cases, to commute sentences by confining a defendant, if of proper age, in the state industrial school, or by placing a defendant on parole in charge of a probation or other proper officer, instead of sending the defendant to the state penitentiary which, is a veritable training school for crime. The statute in question applies only to cases of first offenders. Whether a person convicted of a felony actually is a first offender and otherwise brings himself within the statute, involves a question of fact and that, in turn, sets in motion the discretion of the trial court. *Sessions v. Walker*, 34 Idaho 362, 365, 201 P. 709 (1920). The discretion so set in motion and vested in the trial court by statute is not a mental discretion to be exercised *ex gratia*, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. An examination of the record in the case leaves no doubt but that the defendants brought themselves well within the provisions of the statute. Under these facts and circumstances, the trial court could not act arbitrarily because that would amount to a nullification of the statute. Reversing judgment sentencing two boys under 21 years of age to penitentiary on their plea of guilty of burglary, their first offense. *State v. Yockey*, 57 Idaho 497, 66 P.2d 111 (1937); overruled to the extent of conflict, *State v. Ogata*, 95 Idaho 316, 508 P.2d 141 (1973).

The purpose of the former section was the reformation and rehabilitation of a defendant, particularly a first offender, and to give him an opportunity to reform and take his proper place in society. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950).

The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision. *State v. Sandoval*, 92 Idaho 853, 452 P.2d 350 (1969).

The purpose of the former statute was to

allow, where appropriate, the reformation and rehabilitation of a defendant, particularly a first offender, and to give him an opportunity to reform and take his proper place in society. *State v. Moore*, 93 Idaho 14, 454 P.2d 51 (1969).

The purpose of the retained jurisdiction statute, subdivision 4 of this section, is to allow the trial court additional time to evaluate the defendant's rehabilitation potential and suitability for probation; probation is the ultimate objective sought by a defendant who asks a court to retain jurisdiction. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

The purpose of the retained jurisdiction procedure authorized by this section is to provide a period for evaluation of the offender's potential for rehabilitation and suitability for probation. With the benefit of a report from the correctional facility, the sentencing court may modify the sentence or suspend the sentence and place the defendant on probation. *Thorgaard v. State*, 125 Idaho 901, 876 P.2d 599 (Ct. App. 1994).

Reduction of Sentence.

Although subsection (4) of this section contains no explicit reference to reducing a sentence, there is no reason why a court, exercising the jurisdiction it has retained, may not reduce a sentence earlier pronounced. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

The district court acted beyond its jurisdiction by reducing a sentence after jurisdiction has been relinquished, in response to a motion made after the 120-day period prescribed by Rule 35 had elapsed. *State v. Salsgiver*, 112 Idaho 933, 736 P.2d 1387 (Ct. App. 1987).

Relinquishment of Jurisdiction.

Defendant was not entitled to a court hearing before a district court relinquishes jurisdiction after a period of retained jurisdiction. *State v. Hall*, 112 Idaho 925, 736 P.2d 1379 (Ct. App. 1987).

Inmate was not entitled to counsel at administrative hearing for recommendation on relinquishing jurisdiction nor was he entitled to call his own psychologist unless such psychologist was an "employee" of North Idaho Correctional Institution. *State v. Hall*, 112 Idaho 925, 736 P.2d 1379 (Ct. App. 1987).

District court did not abuse its discretion by relinquishing jurisdiction over defendant's case where record showed that defendant did not successfully complete the first opportunity for rehabilitation afforded by the court through probation under the order withholding judgment, and where the information provided by the jurisdictional review committee during the period of retained jurisdiction disclosed that defendant lacked maturity, job skills and education needed to become self-

sufficient and that these deficiencies were better remedied within the board's institutional environment than under a probation program. *State v. Averill*, 116 Idaho 181, 774 P.2d 351 (Ct. App. 1989).

The district court did not abuse its discretion in relinquishing jurisdiction of defendant in light of the fact that the court had revoked defendant's probation and the court had received a recommendation from the Jurisdictional Review Committee to drop jurisdiction. *State v. Lee*, 117 Idaho 203, 786 P.2d 594 (Ct. App. 1990).

The district judge did not abuse his discretion by releasing jurisdiction, as recommended by the Board of Correction, based upon the board's determination that defendant likely would not be a successful probationer following his escape from custody. *State v. Rocklitz*, 120 Idaho 703, 819 P.2d 121 (Ct. App. 1991).

Based on presentence reports, the probation violation proceedings, the report from the Jurisdictional Review Committee, and statements of employers and relatives, the district court did not abuse its discretion in relinquishing jurisdiction. *State v. Rhoades*, 122 Idaho 837, 839 P.2d 1251 (Ct. App. 1992).

Where defendant pled guilty to third degree arson, destroying livestock, burglary, and grand theft, and where defendant had serious behavioral problems, the district court did not abuse its discretion in refusing to retain jurisdiction over defendant since probation was not an appropriate alternative. *State v. Dechenne*, 124 Idaho 11, 855 P.2d 472 (Ct. App. 1993).

Inmate's due process rights were not denied when he was not allowed to be present at a jurisdictional review committee's initial meeting at which the committee tentatively decided to recommend that jurisdiction be released; inmate was informed of committee's preliminary conclusion and afforded a hearing at which he could comment upon or rebut the recommendation. *Free v. State*, 125 Idaho 760, 874 P.2d 571 (Ct. App. 1994).

Since pursuant to this section a trial court can retain jurisdiction only once, where court had retained jurisdiction on January 17, 1995, and placed defendant on probation which probation was revoked for probation violations, written order of December 29, 1995, which stated that the court was retaining jurisdiction was of no effect and time for appeal was not enlarged as the court had no authority to retain jurisdiction a second time even though court issued a corrected order on January 24, 1996, stating that it was not retaining jurisdiction and appeal filed on February 29, 1996, was more than 42 days from the entry of the order which he attempted to appeal and was thus untimely. *State v. Ferguson*, 130 Idaho 160, 938 P.2d 187 (1997).

Resentencing.

Resentencing was necessary where the trial court's order, rendered orally, was ambiguous to the point that the appellate court was unable to clearly ascertain its intent and could not determine whether, defendant was placed on probation subject to a period of incarceration or if the trial court imposed sentence and retained jurisdiction pursuant to subdivision 4 of this section. *State v. Phillips*, 99 Idaho 354, 581 P.2d 1173 (1978).

Retention of Jurisdiction.

At the termination of the 120-day period provided under subdivision (4), the court's retained jurisdiction of the defendant is not revoked but merely expires and the hearing required where a probation is revoked need not be provided. *State v. Ditmars*, 98 Idaho 472, 567 P.2d 17 (1977), cert. denied, 434 U.S. 1088, 98 S. Ct. 1284, 55 L. Ed. 2d 793 (1978).

Where a trial court, applying subdivision (4), retained jurisdiction over a defendant for 120 days after sentencing, the retention suspended the execution of the already imposed sentence and the order relinquishing jurisdiction merely effectuated such execution. *State v. Ditmars*, 98 Idaho 472, 567 P.2d 17 (1977), cert. denied, 434 U.S. 1088, 98 S. Ct. 1284, 55 L. Ed. 2d 793 (1978).

A termination of the 120-day retained jurisdiction is neither an imposition of sentence nor revocation of a probation and, accordingly, no hearing is required. *Belknap v. State*, 98 Idaho 690, 571 P.2d 336 (1977).

Before a report from a correctional institution is sent back to the sentencing judge pursuant to his retained jurisdiction, certain procedures must be followed: the prisoner must be given adequate notice before the hearing, including notice of the substance of all matters that will be considered; the prisoner must be given an opportunity to explain or rebut any testimony or recommendations; in addition, the prisoner must be free to call witnesses in his behalf from among the employees and other prisoners; and this information should be included in the report sent back to the sentencing judge. *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978).

Since the procedures mandated by *State v. Wolfe*, 99 Idaho 382, 582 P.2d 382 (1978), were ameliorative and not critical to the efficacy of the fact-finding process, the decision in *Wolfe* will be applied only to retained jurisdiction evaluations and recommendations which occur after the date of that decision. *State v. Machen*, 100 Idaho 167, 595 P.2d 316 (1979).

The trial court did not abuse its jurisdiction in failing to retain jurisdiction over the defendant for 120 days, where defendant had spent most of his life, both as a juvenile and as an adult, in correctional institutions, where his past record included six burglary or grand

larceny convictions and one escape conviction, and where defendant was previously convicted and sentenced as a persistent violator of the law in 1961. *State v. Shanacropoulos*, 100 Idaho 789, 605 P.2d 967 (1980).

A hearing before the trial court is not required as a condition precedent to that court's relinquishing its 120 days retained jurisdiction under subdivision 4 of this section. *State v. Lopez*, 102 Idaho 692, 638 P.2d 889 (1981).

A trial court's refusal to retain jurisdiction, under subdivision 4 of this section, for further evaluation of a defendant will not be deemed a clear abuse of discretion if the trial court already has sufficient information to determine that a suspended sentence and probation would be inappropriate under § 19-2521. Accordingly, where the trial judge was informed that the defendant had committed the crime in question while on probation from a court in Oregon and that the defendant had committed two misdemeanors while the instant case was pending, the district court had sufficient information to deny probation in conformity with § 19-2521 and the court's refusal to retain jurisdiction, for further evaluation, would not be disturbed on appeal. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

Where the trial court, after orally sentencing the defendant to six years in the penitentiary for possession of stolen property, suspended the execution of the sentence and retained jurisdiction for 120 days, the actions of the trial court did not result in the defendant obtaining a probation-like status which would have entitled him to all the due process protections involved in a probation revocation hearing since the defendant had remained in custody throughout the period and since the trial court had made clear that it would not consider probation for the defendant until he cooperated with the authorities. *State v. Schrom*, 105 Idaho 769, 673 P.2d 71 (1983).

The retention of jurisdiction under subdivision 4 of this section is discretionary with the sentencing court; accordingly, where it was clear from the court's comments that the defendant was not a likely candidate for probation, in the court's estimation, and the presentence report showed that earlier attempts at probation for the defendant, on offenses in another state, had proved unsuccessful, the court did not abuse its discretion in sentencing the defendant without retaining jurisdiction. *State v. Yarbrough*, 106 Idaho 545, 681 P.2d 1020 (Ct. App. 1984).

Refusal to retain jurisdiction under subdivision 4 of this section will not be deemed a "clear abuse of discretion" if the trial court has sufficient information to determine that a suspended sentence and probation would be inappropriate under § 19-2521. *State v.*

Chapel, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

A trial court is not bound by a sentence recommendation made by the State because such a recommendation is purely advisory; accordingly, the trial court did not abuse its discretion when it failed to follow the State's recommendation to retain jurisdiction under subdivision 4. of this section. *State v. Chapel*, 107 Idaho 193, 687 P.2d 583 (Ct. App. 1984).

Because the trial judge gave sound reasons for the sentence imposed and because his retained jurisdiction would enable him to modify the sentence in the event the proposed rehabilitative measures were not followed, the defendant's sentence of an indeterminate term of four years for aggravated battery was not excessive. *State v. Burroughs*, 107 Idaho 195, 687 P.2d 585 (Ct. App. 1984).

A district judge is not precluded, as a matter of law, from retaining jurisdiction on a consecutive sentence. *State v. Keller*, 108 Idaho 643, 701 P.2d 263 (Ct. App. 1985).

When a judge has sufficient information at the time of sentencing to deny probation, refusal to retain jurisdiction for further evaluation is not an abuse of discretion. *State v. Beebe*, 113 Idaho 977, 751 P.2d 673 (Ct. App. 1988).

When the district court entered its first judgments of conviction and sentences, the court did not retain jurisdiction pursuant to this section, nor was any appeal taken from either of those two original judgments and accordingly, they became final, and the district court did not have jurisdiction or authority later either to set them aside or to enter the amended judgments of conviction. *State v. Kelsey*, 115 Idaho 311, 766 P.2d 781 (Ct. App. 1988).

While the district court did not have jurisdiction to enter the amended judgments of conviction of defendant who was originally sentenced to Youth Services Center Serious Offender Program, it did have authority to modify the terms of the original probation when the state terminated the program and the district court's order retaining jurisdiction and committing defendant to the Cottonwood facility for therapy and evaluation to determine whether he was fit for probation was tantamount to such a change. *State v. Kelsey*, 115 Idaho 311, 766 P.2d 781 (1988).

Whether to retain jurisdiction is a question left to the court's discretion, as is the decision to grant probation. *State v. Hernandez*, 122 Idaho 227, 832 P.2d 1162 (Ct. App. 1992).

The trial court did not have authority to retain jurisdiction a second time, more than 120 days after a sentence to the custody of the board of corrections, following revocation of defendant's probation. *State v. Travis*, 125 Idaho 1, 867 P.2d 234 (1994).

A court is authorized to retain jurisdiction

upon revocation of probation and commitment of the defendant to the custody of the Board of Correction (the Board), provided the court has not previously retained jurisdiction while the defendant was in the custody of the Board in the same case. *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994).

When probation is granted, there is no occasion for the court to retain jurisdiction pursuant to subdivision (4) of this section unless and until probation is revoked and execution of sentence is ordered. At that point, the defendant is committed to the custody of the Board of Correction and, for the first time, the opportunity arises for the court to retain jurisdiction and later suspend further execution of the judgment pursuant to subsection (4) of this section. *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994).

After the court initially has retained jurisdiction over a defendant and then places the defendant on probation, if the defendant later is found to have violated the terms of his or her probation, the court cannot once again validly retain jurisdiction under the statute, but may, of course, continue the defendant on probation. *State v. Maggard*, 126 Idaho 477, 886 P.2d 782 (Ct. App. 1994).

—Dismissal.

Section 19-2604(2) did not grant authority to a trial court to dismiss a case after completion of probation granted pursuant to this section during retained jurisdiction; the trial court only had the authority to amend the judgment to reflect confinement in a penal facility for the time defendant served and to deem the conviction a misdemeanor. *State v. Funk*, 123 Idaho 967, 855 P.2d 52 (1993).

—Due Process.

Prior to its amendment in 1995, the structure of the Idaho retained jurisdiction program was held, by both the state and federal courts, to require that participants in that program be afforded certain due process protections with regard to the preparation of the jurisdictional review committee's report. *State v. Coassolo*, — Idaho —, — P.3d —, 2000 Ida. App. LEXIS 60 (Ct. App. Aug. 1, 2000).

—Psychological Evaluation.

The judge erred in a case involving lewd conduct and sexual abuse of a minor by not ordering a psychological evaluation as part of the presentence investigation or through retained jurisdiction, because, although a psychological evaluation is not required in every case where the court orders a presentence investigation, in this case, defendant had a solid work history, was a family man, and had no prior criminal record. *State v. Sabin*, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

Revocation of Probation.

When a trial court has initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentence and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment. *State v. Pedraza*, 101 Idaho 440, 614 P.2d 980 (1980).

Even if a probation violator's location is known and the state has failed to act with due diligence to revoke probation, there is no waiver unless the resultant delay is "unreasonable"; a delay is not unreasonable, and a probationer is not entitled to complain that his federal or state due process rights have been denied, unless he is able to show substantial prejudice to his ability to answer the charge of probation violation. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Probation officers often encounter violations that, in the exercise of good judgment, do not demand the extreme remedy of violation proceedings and the officer should be free to delay commencing revocation proceedings, for a reasonable period of time, while he sees how the probationer is responding; unless such delay can be shown to have interfered substantially with the probationer's ability to successfully refute the charge, there is no violation of due process and no waiver of the state's right to proceed. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Where probationer, who disappeared for three years, left state without permission of probation and parole department, filed no further monthly reports and failed to notify probation or police authorities in other states of his status, fact that state did not seek bench warrant until 18 months after probationer's disappearance did not prejudice his ability to answer the probation violation charge and probation violations were not waived. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Where the defendant, by his volitional conduct, breached the terms of probation and engaged in threatening behavior towards others, the district court did not abuse its discretion in revoking his probation. *State v. Grove*, 109 Idaho 372, 707 P.2d 483 (Ct. App. 1985).

Despite defendant's challenge that one violation serving as the basis for the revocation of his probation was unsupported by evidence, where the record made clear the district court would have revoked defendant's probation based on three other unchallenged grounds, the revocation was affirmed. *State v. Upton*, 127 Idaho 274, 899 P.2d 984 (Ct. App. 1995).

—Timeliness of I.C.R. 35 Motion.

Where defendant pled guilty to felony driving under the influence and was sentenced and released on probation, the court's juris-

diction was retained while defendant was on probation, and because there was no relinquishment of jurisdiction, the time period for filing a I.C.R. 35 motion predicated upon that event simply never began and the only subsequent event that triggered the application of I.C.R. 35 was the revocation of defendant's probation, and no motion was filed at that time. *State v. Zamarripa*, 120 Idaho 751, 819 P.2d 1151 (Ct. App. 1991).

Sentencing Report.

An inmate possesses a liberty interest in the proceedings by which the staff at the correctional facility develops its report to the sentencing court. The liberty interest entitles the inmate to certain minimum due process safeguards. These are: (a) adequate notice before the hearing, including notice of the substance of all matters that will be considered; (b) an opportunity to explain or rebut any testimony or recommendations; and (c) an opportunity to call witnesses in the inmate's behalf from among the employees and other prisoners. This information is to be included in the report sent to the sentencing court. *Thorgaard v. State*, 125 Idaho 901, 876 P.2d 599 (Ct. App. 1994).

District court did not err by considering hearsay information in the addendum to the presentence investigation report (APSI) where a defendant was not entitled to respond to information in an APSI upon a review of retained jurisdiction; Idaho Code § 19-2601(4) did not mean that the APSI was subject to the requirement, otherwise applicable to presentence investigation reports, that defendants had an opportunity to counter or explain hearsay information. *State v. Goodlett*, — Idaho —, 77 P.3d 487 (Ct. App. 2003).

Suspension of Execution.

This section provides only that a trial court may suspend the execution of judgment and does not authorize the court to suspend the imposition of sentence. *State v. Pedraza*, 101 Idaho 440, 614 P.2d 980 (1980).

Time of Exercising Provisions.

Provisions of this section must be exercised by court at time of rendition of judgment, and such parole or suspension of sentence must be included therein and become part thereof, and cannot be invoked at date subsequent thereto. *State v. Ensign*, 38 Idaho 539, 223 P. 230 (1924); *In re Grove*, 43 Idaho 775, 254 P. 519 (1927).

While court, on plea of guilty, may postpone judgment for reasonable time for purpose of examining into facts of crime with view to proper punishment, it cannot indefinitely withhold judgment, discharge defendant, and thereafter hale him into court and enter such judgment as might have been originally pro-

nounced. In *re Grove*, 43 Idaho 775, 254 P. 519 (1927).

Where on a plea of guilty, the court withheld sentence and released defendant without a compliance with this chapter, a subsequent judgment three and one half years later, imposing sentence, was void and defendant was entitled to a discharge on habeas corpus. *Ex parte Grove*, 43 Idaho 775, 254 P. 519 (1927).

Where maximum sentence for conviction for drawing a check without funds was six months at the time the crime was committed, judgment placing defendant on probation for two years was excessive, but judgment of probation was valid for period of six months. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

Court may place defendant on probation following plea of guilty without necessity of adjudication of guilt by the court. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

A court cannot indefinitely suspend pronouncement of sentence, and if the court indefinitely suspends pronouncement of sentence it loses jurisdiction. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Order on July 18, 1952 suspending judgment for commission of offense of grand larceny until September term of court for year of 1954 was for a reasonable and definite period. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Once judgment of conviction is affirmed by court of appeal the trial court does not have jurisdiction to consider application by defendant for probation, but must enforce the judgment. *State v. Johnson*, 75 Idaho 157, 269 P.2d 769 (1954).

The request for a writ of prohibition against the district court was not premature in that the court had neither granted nor refused the requested probation or parole where conviction upon sentence for first degree burglary had been affirmed, such district court having already attempted to take jurisdiction of such petition for probation, ordering an investigation for the purpose of determining the merits thereof. *Forbush v. Thatcher*, 78 Idaho 597, 309 P.2d 203 (1957).

An I.C.R., Rule 35 motion cannot be filed more than 120 days after a sentence is pronounced and suspended, but less than 120 days after the sentence is ordered into effect upon revocation of probation. *State v. Omev*, 112 Idaho 930, 736 P.2d 1384 (Ct. App. 1987).

Withheld "Judgment."

The ability to withhold a judgment and thereby spare the defendant, particularly a first time offender, the burden of a criminal record, and yet, to emphasize the seriousness of the defendant's action by conditioning that withheld judgment on a period of incarceration or payment of a fine is certainly one of the

many sentencing alternatives the legislature intended to be available to the courts, and the payment of court costs and restitution are also proper and often very useful conditions of withheld judgments and probation. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

The terms which the court may prescribe as conditions of a withheld judgment pursuant to subdivision 3 of this section need not be more limited than the terms which the court may prescribe as conditions of a suspended sentence and judgment pursuant to subdivision 2 of this section which include fines and imprisonment. *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978).

Although there was arguably some ambiguity in the text of written judgment, but there was absolutely no ambiguity in the oral sentence pronounced by the district court which clearly and unequivocally granted defendant a withheld judgment and placed him on probation for a period of five years, since the oral sentence clearly granted defendant a withheld judgment, the written judgment was not as in conflict with the clearly expressed intent of the district court at the time sentence was pronounced. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

The difference between suspending the imposition of sentence and withholding judgment is that under the former the defendant's judgment of conviction is entered, whereas in the latter case it is withheld. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

When a defendant receives a withheld judgment he is placed on probation to the Board of Correction. However, after the court has granted a withheld judgment to a defendant and placed him on probation, jurisdiction is retained during the probationary period and the district court has continuing jurisdiction to modify its conditions. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Where the record unequivocally demonstrated that the district judge at the time of the original sentencing imposed a 60-day period of incarceration as a condition of probation and made it clear that if defendant did not abide by the terms of the withheld judgment he could be brought before the district court and have a sentence of up to life imprisonment imposed for the crime of lewd and lascivious conduct, defendant was on notice at the time of sentencing that a lengthy sentence was possible when he accepted the terms and conditions of the withheld judgment and if defendant did violate the terms of his probation, the actions of the district court in imposing the 20-year sentence were in accord with the statutes and case law of this state. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Defendant's contention that initial order imposing probation was an illegal hybrid of a withheld judgment and a suspended sentence

was without merit, since even though written order was somewhat ambiguous, the record sufficiently showed that the district court withheld judgment, and did not impose a sentence to the custody of the Board of Correction which was suspended, when placing defendant on probation. *State v. Wilson*, 127 Idaho 506, 903 P.2d 95 (Ct. App. 1995).

Since the judiciary does not have the "inherent power" to withhold judgments then any such power conferred on the courts by the legislature may be abrogated by statute. Thus, a withheld sentence that did not meet the standards of § 37-2738 is invalid, and must be corrected under the state's motion. *State v. Branson*, 128 Idaho 790, 919 P.2d 319 (1996).

When judgment is withheld under paragraph (3), no sentence is actually imposed on the defendant and no judgment of conviction is entered; therefore, when a defendant is given a withheld judgment and placed on probation, the district court has continuing jurisdiction to modify all aspects of the disposition, and if the conditions of probation are violated, the district court may revoke the defendant's probation and thereafter impose any sentence which originally might have been imposed. *State v. Murillo*, 135 Idaho 811, 25 P.3d 124 (Ct. App. 2001).

—Awareness of Factors.

A judge does not have to systematically recite each factor in I.M.C.R. 10 before deciding on a motion for withheld judgment; the record is sufficient if it shows the judge is aware of the factors he is required to consider. Indeed, he may simply refer to the factors or to the appropriate rule. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

—Discretion of Trial Court.

The determination of an appropriate sentence is vested within the sound legal discretion of the trial court; refusal to grant a withheld judgment will not be deemed an abuse of discretion if the trial court has sufficient information to determine that a withheld judgment would not be appropriate. *State v. Geier*, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985).

—No Equation to a Right.

Rule 10, I.M.C.R., expresses criteria for the sentencing court to consider before granting any withheld judgment pursuant to this section. The presence of these factors in any given case does not equate to a right to receive this sentencing alternative. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

—No Mandate.

Rule 10 and this section do not mandate, encourage or prioritize the granting of withheld judgments. Rather, if a sentencing court in its discretion concludes a withheld judg-

ment is appropriate, the court in the magistrate division must first consider the factors outlined in Rule 10. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

—Properly Denied.

Where defendant, who pled guilty to three counts of omitting material facts in the sale of securities, was convicted and sentenced to a suspended three-year term with nine years of probation and ordered to make \$42,000 in restitution to the defrauded investors and to perform 2,500 hours of community service, the trial court did not abuse its sentencing discretion by failing to grant a withheld judgment, because the public interest would be best served by requiring defendant to make restitution, keeping defendant out of the security-advising field and deterring others. *State v. Geier*, 109 Idaho 963, 712 P.2d 664 (Ct. App. 1985).

Although the court's refusal to grant a withheld judgment could prevent the defendant from continuing his employment in the banking industry, the district court did not abuse its sentencing discretion by refusing to grant a withheld judgment, where the defendant had repeatedly schemed over a period of time to defraud several persons and firms of large sums of money, and he had obtained another highly responsible position with a bank without disclosing to his present employer the true nature and extent of his criminal acts in this action. *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986).

Magistrate did not abuse his discretion by failing to grant a withheld judgment for a DUI offense, even though magistrate had a personal policy of not granting withheld judgments, where the transcript of the sentencing hearing shows the magistrate knew the true scope of his sentencing discretion, he recognized that a withheld judgment was available, not proscribed, as a sentencing alternative, and he articulated a policy that was not totally inflexible. *State v. Glidden*, 115 Idaho 560, 768 P.2d 823 (Ct. App. 1989).

Even when the defendant was justifiably angry, where he consciously shot his victim, the violent nature of the crime provided the district court with sufficient information from which it could reasonably determine that a withheld judgment would be inappropriate. *State v. Trejo*, 132 Idaho 872, 979 P.2d 1230 (Ct. App. 1999).

Refusal to grant a withheld judgment was not an abuse of discretion where the trial court had sufficient information to determine that a withheld judgment would not be appropriate. *State v. Edghill*, 134 Idaho 218, 999 P.2d 255 (Ct. App. 2000).

—Violation of Probation.

Where it was determined that a probation violation had occurred following the grant of a withheld judgment to defendant, the district court had the statutory jurisdiction and au-

thority to impose upon defendant any sentence which originally might have been imposed at the time of conviction, so long as it was within the statutory limits. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Written Order.

Parole statute requires that terms on which and time for which judgment is withheld be made part of written order. In re *Grove*, 43 Idaho 775, 254 P. 519 (1927).

Opinions of Attorney General. A person who is pardoned or who has successfully completed the period of a withheld judgment and had his or her guilty plea or conviction negated or expunged may possess and transact firearms without violating the federal Gun Control Act; however, during the probationary period of a withheld judgment and during and after the term which a person serves on probation with a suspended sentence or on parole, such person is a convicted felon for the purposes of the Gun Control Act. OAG 86-16.

Collateral References. 21A Am. Jur. 2d, Criminal Law, § 895 et seq.

59 Am. Jur. 2d, Pardon and Parole, § 74 et seq.

24 C.J.S., Criminal Law, §§ 1549-1568.

Parole as suspending running of sentence. 28 A.L.R. 947.

Leaving state or locality, validity of probation on condition of. 70 A.L.R. 100.

Extradition of paroled convict. 78 A.L.R. 422.

Right to assistance of counsel at proceedings to revoke probation. 44 A.L.R.3d 306.

Propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like. 45 A.L.R.3d 1022.

State court's power to place defendant on probation without imposition of sentence. 56 A.L.R.3d 932.

What constitutes "good behavior" within statute or judicial order expressly conditioning suspension of sentence thereon. 58 A.L.R.3d 1156.

Propriety, in imposing sentence for original offense after revocation of probation, of considering acts because of which probation was revoked. 65 A.L.R.3d 1100.

Ability to pay as necessary consideration in conditioning probation or suspended sentence upon reparation or restitution. 73 A.L.R.3d 1240.

Right in absence of express statutory authorization, of one convicted of crime and imprisoned or paroled, to prosecute civil action. 74 A.L.R.3d 680.

Acquittal in criminal proceeding as precluding revocation of probation on same charge. 76 A.L.R.3d 564.

Acquittal in criminal proceeding as precluding revocation of parole on same charge. 76 A.L.R.3d 578.

Propriety of revocation of probation or subsequent criminal conviction which is subject to appeal. 76 A.L.R.3d 588.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure. 77 A.L.R.3d 636.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 A.L.R.3d 976.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches. 79 A.L.R.3d 1083.

Revocation of order commuting state criminal sentence. 88 A.L.R.5th 463.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches. 99 A.L.R.5th 557.

19-2602. Violation of probation — Arrest. — If it is proved to the satisfaction of the court that the terms and conditions upon which the defendant was placed on probation by the court or any of them have been violated or for any other cause satisfactory to the court, the court may, at any time within the longest period for which the defendant might have been originally sentenced by judgment of the court, issue a bench warrant for the rearrest of the defendant. [1915, ch. 104, part of § 1, p. 245; reen. C.L., § 8000; C.S., § 9044; I.C.A., § 19-2504.]

Compiler's notes. The section heading of this section previously read "Violation of parole — Arrest". However, since the section refers to probation and not parole "probation" has been substituted for "parole".

Cross ref. See notes, § 19-2601. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Cited in: *State v. Edelblute*, 91 Idaho 469,

424 P.2d 739 (1967); *Chapa v. State*, 115 Idaho 560, 767 P.2d 282 (Ct. App. 1989).

ANALYSIS

Cause for revocation.

Due process requirements.

Hearing.

Pronouncement of judgment.
Reinstatement of sentence.

Cause for Revocation.

Court is not restricted to terms and conditions of probation order in revoking probation but can revoke probation upon "proof for any other cause satisfactory to the court." *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

The defendant's admitted commission of a felony (possession of a dangerous weapon by an inmate) was a "cause satisfactory to the court" for revoking the suspended sentence and reinstating the sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Where the conditions of probation were not presented to the defendant in writing and explained to him by the sentencing court or at an early conference with the probation officer prior to the time the defendant was alleged to have violated the conditions of his probation, the alleged violation of probation could not be the basis of reinstating his sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Due Process Requirements.

Due process requires a hearing before probation is revoked, giving the probationer a reasonable opportunity to examine and rebut adverse evidence and to cross-examine hostile witnesses; however, proof of probation violation beyond a reasonable doubt is not required. *State v. Bingham*, 107 Idaho 501, 690 P.2d 956 (Ct. App. 1984).

Hearing.

Defendant is not entitled to a formal hearing on revocation of probation. *Ex parte Med-*

ley, 73 Idaho 474, 253 P.2d 794 (1953).

A probationer must be given a due process hearing before probation can be revoked upon satisfactory proof of a violation of a probation condition or "any other cause satisfactory to the court." *State v. Greenawald*, 127 Idaho 555, 903 P.2d 144 (Ct. App. 1995).

Pronouncement of Judgment.

If any of conditions imposed by court in granting probation is violated the court may issue a warrant for rearrest of defendant, have him brought before the court, revoke probation, and pronounce judgment which it could have pronounced originally. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Reinstatement of Sentence.

Where no motion to reduce the sentence was made under I.C.R. 35, nor was any suggestion made to the judge that under this section he could choose not to reinstate the full ten-year sentence, the district court did not abuse its discretion in reinstating the remainder of the defendant's ten-year indeterminate sentence, where the defendant was found to be in possession of a dangerous weapon while in jail. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Collateral References. Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for the remainder of term. 147 A.L.R. 656.

Notice and hearing before revocation of suspension of sentence, right to. 29 A.L.R.2d 1074.

Right to assistance of counsel at proceedings to revoke probation. 44 A.L.R.3d 306.

19-2603. Pronouncement and execution of judgment after violation of probation. — When the defendant is brought before the court in such case, it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced, or, if judgment was originally pronounced but suspended, the original judgment shall be in full force and effect and may be executed according to law, and the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant's sentence shall count from the date of service of such bench warrant. [1915, ch. 104, part of § 1, p. 245; reen. C.L., § 8001; C.S., § 9045; I.C.A., § 19-2505.]

Compiler's notes. The section heading of this section previously read, "Pronouncement and execution of judgment after violation of parole." However, since this section deals with probation and not parole, "probation" has been substituted for "parole."

Cited in: *State v. Chilton*, 116 Idaho 274,

775 P.2d 166 (Ct. App. 1989); *State v. Buzo*, 121 Idaho 324, 824 P.2d 899 (Ct. App. 1991); *State v. Gallipeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994); *State v. Lively*, 131 Idaho 279, 954 P.2d 1075 (Ct. App. 1998); *State v. Murillo*, 135 Idaho 811, 25 P.3d 124 (Ct. App. 2001).

ANALYSIS

Allocution.

Computing severity of sentence.

Confinement out-of-state.

Credit for probation time.

Credit for time served.

Evidence considered.

Hearing.

Increase of original sentence.

Notice of hearing.

—Waiver.

Order of probation.

Pronouncement of judgment.

Reinstatement of sentence.

Revocation of probation.

Section heading.

Allocution.

Allocution is required if the trial court had not originally imposed sentence, but had withheld judgment until the probation revocation proceeding. There is, however, no right of allocution at a probation revocation proceeding when the original sentence is ordered executed. Opportunity for allocution is the preferred or better practice in all sentencing situations. *State v. Nez*, 130 Idaho 950, 950 P.2d 1289 (Ct. App. 1997).

Computing Severity of Sentence.

Where, appeal is made, on the grounds of excessiveness of sentence, from the imposition of a previously suspended sentence, the relevant facts are those within a time frame extending from the original pronouncement of the sentence to its subsequent imposition upon revocation of probation. For the purpose of appellate review, the date of first eligibility for parole is the benchmark for measuring the term of confinement imposed by an indeterminate sentence. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Confinement Out-of-State.

Probation violator's arrest and confinement in California, before he was delivered to the Idaho authorities, had nothing to do with the Idaho convictions; violator was not entitled to credit for any time spent in California custody, other than the concurrent operation of the Idaho and California sentences after his probation was revoked in Idaho. *State v. Teal*, 105 Idaho 501, 670 P.2d 908 (Ct. App. 1983).

Credit for Probation Time.

The district judge did not err in refusing to give defendant credit for time that he spent on probation before the probation was finally terminated. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

Credit for Time Served.

Where a defendant, convicted of assault and escape by one charged with a felony, violated his probation with the result that his

original sentence of imprisonment was reinstated, he was entitled to credit for all time served since the bench warrant was issued for his rearrest. *State v. Maki*, 98 Idaho 557, 569 P.2d 361 (1977).

A June 7, 1991, order for incarceration was in substance and effect a bench warrant for defendant's arrest in connection with an alleged probation violation. Therefore, under this section, he was entitled to credit for the period served in jail upon that order, and where, on the day following the expiration of the ordered 30-day incarceration, the district court issued a bench warrant calling for defendant's arrest for a probation violation relating to his failure to follow his program schedule, defendant was also entitled to credit under this section for any further jail time served pursuant to that bench warrant. *State v. Buys*, 129 Idaho 122, 922 P.2d 419 (Ct. App. 1996).

Evidence Considered.

Where defendant was aware that, prior to the probation violation proceeding, the court had received reports mentioning his continued use of alcohol, his discontinued use of prescribed medication, his lack of cooperation in mental health counselling, and of an alleged incident involving homosexual advances to a 15-year-old boy, which reports had been submitted in support of a petition for psychological evaluation of defendant during his probation, the district court did not err by considering these matters in the course of determining whether to discontinue probation after a violation had been admitted; under these circumstances, advance notice to defendant, that the court would consider these matters, was not required. Aside from the notice issue, it is well settled that once a probation violation is properly shown — as it was when defendant admitted a battery conviction — the court may consider other incidents of probation violation which have not been formally charged, in determining whether the probation should be revoked or continued. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Hearing.

Before probation can be revoked and sentence pronounced or executed, the defendant must be granted a summary hearing under § 20-222 and be given a reasonable opportunity to refute charges of probation violation. *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967).

Increase of Original Sentence.

If a person is initially sentenced to a term of confinement, but the sentence is suspended and probation is granted, the court may not later increase the term of confinement when probation is revoked. *State v. Mendenhall*,

106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

The principle of this section that a sentence may not be increased when probation is revoked limits but does not displace — and is not displaced by — the principle of consecutive imprisonment for escape established by § 18-2505 and the principles are not mutually exclusive; the court may impose consecutive terms in cases outside the scope of this section and may correct an illegal, concurrent sentence by making it consecutive, in a case under this section, but the range of corrective sentences is narrowed to those which will not increase the aggregate penalty imposed. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

Where defendant was incorrectly sentenced to two five-year concurrent, rather than consecutive, sentences for larceny and escape, and the trial judge who revoked defendant's probation then imposed two five-year consecutive sentences, the trial judge exceeded his authority by imposing an aggregate penalty exceeding that in the original sentences. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

Notice of Hearing.

—Waiver.

Although the defendant did not receive written notice of the alleged violation of probation or cause satisfactory to the court for revoking the suspended sentence before the hearing at which the violation was admitted, he waived his right to notice when he elected to proceed without an evidentiary hearing or a formal affidavit from the Department of Probation and Parole. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Order of Probation.

Where defendant violated the special conditions of his probation and the inconsistencies in the order of probation did not mislead or prejudice defendant, the trial court did not err in denying defendant's motion to vacate the order revoking his probation. *State v. Morris*, 98 Idaho 328, 563 P.2d 52 (1977).

Pronouncement of Judgment.

If any conditions imposed by court in granting probation is violated the court may issue a warrant for rearrest of defendant, have him brought before the court, revoke probation, and pronounce judgment which it could have pronounced originally. *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

Reinstatement of Sentence.

When a trial court has initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentence and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment.

State v. Pedraza, 101 Idaho 440, 614 P.2d 980 (1980).

Where defendant received five-year sentence for robbery enhanced by three-year sentence for use of firearm, which sentences were within the statutory maximums, and where such sentences were suspended and defendant placed on probation, but defendant subsequently violated probation, the reimposition of the balance of the sentence, including the enhanced portion, was not excessive. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

If a defendant violates his probation, he may be ordered to serve the full balance of the sentence previously imposed but suspended, and he also may be prosecuted, convicted and sentenced for any other crime committed while violating the probation; however, a judge, upon revoking probation, must refrain from increasing the original sentence upon a hindsight view of the appropriate measure of punishment, and the thrust of this principle is not blunted by a legal defect in the original sentence where the defect lies in the form of the sentence, not in the length of the punishment imposed. *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984).

The defendant's admitted commission of a felony—possession of a dangerous weapon by an inmate — was a "cause satisfactory to the court" for revoking the suspended sentence and reinstating the sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Where the conditions of probation were not presented to the defendant in writing and explained to him by the sentencing court or at an early conference with the probation officer prior to the time the defendant was alleged to have violated the conditions of his probation, the alleged violation of probation could not be the basis of reinstating his sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Where no motion to reduce the sentence was made under I.C.R. 35, nor was any suggestion made to the judge that under this section he could choose not to reinstate the full ten-year sentence, the district court did not abuse its discretion in reinstating the remainder of the defendant's ten-year indeterminate sentence, where the defendant was found to be in possession of a dangerous weapon while in jail. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Revocation of Probation.

Where the court reviewed defendant's prior lack of response to psychiatric treatment and determined the likelihood of success for future treatment was minimal, defendant's admitted violation of probation by a battery offense was a reasonable ground to revoke

probation, and there was no abuse of discretion by the district court. *State v. Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct. App. 1982).

Until a probation was revoked and a sentence of incarceration was executed, the trial court never lost, and the Idaho Department of Corrections never acquired, jurisdiction over a probationer; the trial court's revisiting of the disposition order was permissible because the reconsideration occurred in what was, in substance, a continuation of the initial dispo-

sition hearing. *State v. Done*, — Idaho —, 84 P.3d 571 (Ct. App. 2003).

Section Heading.

The heading of I.C. § 19-2603 is entitled "Pronouncement and execution of judgment after violation of parole." The use of the term "parole" is erroneous. As with the heading of § 19-2602, the term should instead be "probation." *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).

19-2604. Discharge of defendant — Amendment of judgment. —

1. If sentence has been imposed but suspended, or if sentence has been withheld, upon application of the defendant and upon satisfactory showing that the defendant has at all times complied with the terms and conditions upon which he was placed on probation, the court may, if convinced by the showing made that there is no longer cause for continuing the period of probation, and if it be compatible with the public interest, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant; and this shall apply to the cases in which defendants have been convicted and granted probation by the court before this law goes into effect, as well as to cases which arise thereafter. The final dismissal of the case as herein provided shall have the effect of restoring the defendant to his civil rights.

2. If sentence has been imposed but suspended during the first one hundred and eighty (180) days of a sentence to the custody of the state board of correction, and the defendant placed upon probation as provided in subsection 4 of section 19-2601, Idaho Code, upon application of the defendant, the prosecuting attorney, or upon the court's own motion, and upon satisfactory showing that the defendant has at all times complied with the terms and conditions of his probation, the court may amend the judgment of conviction from a term in the custody of the state board of correction to "confinement in a penal facility" for the number of days served prior to suspension, and the amended judgment may be deemed to be a misdemeanor conviction.

3. Subsection 2 of this section shall not apply to any judgment of conviction for a violation of the provisions of sections 18-1506, 18-1507 or 18-1508, Idaho Code. A judgment of conviction for a violation of the provisions of any section listed in this subsection shall not be expunged from a person's criminal record. [1915, ch. 104, part of § 1, p. 245; reen. C.L., § 8002; am. 1919, ch. 134, § 2, p. 429; C.S., § 9046; I.C.A., § 19-2506; am. 1951, ch. 99, § 1, p. 224; am. 1970, ch. 143, § 4, p. 425; am. 1971, ch. 97, § 2, p. 210; am. 1989, ch. 305, § 1, p. 759.]

Compiler's notes. Sections 2 and 5 of S.L. 1970, ch. 143 are compiled as §§ 19-2514 and 20-101, respectively, and § 3 was repealed.

Section 1 of S.L. 1971, ch. 97 was repealed.

Cited in: *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958); *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964); *State v. Edelblute*,

91 Idaho 469, 424 P.2d 739 (1967); *State v. Pedraza*, 101 Idaho 440, 614 P.2d 980 (1980); *State v. Bias*, 111 Idaho 129, 721 P.2d 728 (Ct. App. 1986); *State v. Smith*, 121 Idaho 20, 822 P.2d 539 (Ct. App. 1991); *State v. Harbaugh*, 123 Idaho 835, 853 P.2d 580 (1993); *State v. Walker*, 126 Idaho 508, 887 P.2d 53 (Ct. App. 1994).

ANALYSIS

Compliance with probation required.
Conditions of withheld judgment.
Constitutionality.
Construction with other laws.
Conviction.
—Vacated.
Effect of withheld judgment.
In general.
Partial expungement.
Persistent violators.
Probation.
Retained jurisdiction.
Timeliness of motion.

Compliance With Probation Required.

Because subsection (1) requires compliance with the terms and conditions of probation “at all times,” the district court did not have authority to expunge the record and restore the civil rights of a defendant who twice violated his probation. *State v. Schumacher*, 131 Idaho 484, 959 P.2d 465 (Ct. App. 1998).

Court erred by granting defendant’s motion to expunge the guilty plea after compliance with probation where the court did not make any factual findings as to whether the defendant was in compliance with the probation conditions at all times. *State v. Hanes*, 137 Idaho 40, 44 P.3d 295 (Ct. App. 2002).

Phrase “has at all times complied with the terms and conditions of his probation” in Idaho Code § 19-2604(2) does not refer only to the defendant’s most recent period of probation but to all periods of probation imposed with respect to the particular criminal charge. *State v. Schwartz*, — Idaho —, 79 P.3d 719 (2003).

Defendant was not entitled to have his guilty plea set aside where he failed to comply with the conditions of his probation. Idaho Code § 19-2604(1) permits a district court to deny relief if the defendant violates the terms and conditions of his or her probation, regardless of whether the violation was willful. *State v. Hanes*, — Idaho —, 79 P.3d 1070 (Ct. App. 2003).

Conditions of Withheld Judgment.

Under this section, until the conditions of a withheld judgment have been satisfied, a defendant subject to those conditions by way of his guilty plea or verdict of guilty is a convicted felon. *United States v. Locke*, 409 F. Supp. 600 (D. Idaho), *aff’d*, 542 F.2d 800 (9th Cir. 1976).

Where defendant, who had pleaded guilty to charge of burglary and had been placed on probation, received and possessed firearms after the period of probation, but where defendant had not applied to have guilty plea set aside, defendant was a convicted felon and subject to punishment for violating federal statute proscribing convicted felon from pos-

sessing or receiving firearm in commerce. *United States v. Locke*, 409 F. Supp. 600 (D. Idaho), *aff’d*, 542 F.2d 800 (9th Cir. 1976).

Constitutionality.

The mandatory language of this section which prohibits the reduction of a conviction for lewd conduct with a minor child from a felony to a misdemeanor did not violate defendant’s equal protection rights because the statute’s classification is rationally related to its declared purpose of deterring sexual offenses against children, and this rational relationship is not diminished by the fact that it does not cover every conceivable statute under which a person could be convicted of such acts. *State v. Mowrey*, 134 Idaho 751, 9 P.3d 1217 (2000).

Construction with Other Laws.

A person who has had a state criminal conviction dismissed pursuant to this section may still be considered a person who has been convicted of a crime punishable for a term exceeding one year within the meaning of 18 U.S.C. § 922(h)(1). *United States v. Bergeman*, 592 F.2d 533 (9th Cir. 1979).

Conviction.

Where defendant, who had pleaded guilty to charge of burglary and had been placed on probation, received and possessed firearms during the period of probation, defendant was a “convicted felon,” since defendant had not as of the dates of possession and receipt fulfilled the conditions imposed upon him by the trial which withheld judgment in the burglary prosecution. *United States v. Locke*, 409 F. Supp. 600 (D. Idaho), *aff’d*, 542 F.2d 800 (9th Cir. 1976).

—Vacated.

A felony conviction which has been vacated and the charge dismissed after the entry of a not guilty plea pursuant to this section cannot be the basis for revocation of a veterinary license. *Manners v. State Bd. of Veterinary Medicine*, 107 Idaho 950, 694 P.2d 1298 (1985).

Effect of Withheld Judgment.

Where defendant, who had pleaded guilty to charge of burglary and had been placed on probation, received and possessed firearms during the period of probation, defendant was subject to punishment for violating federal statute proscribing convicted felon from possessing or receiving firearm in commerce, even though judgment in the burglary case was withheld. *United States v. Locke*, 409 F. Supp. 600 (D. Idaho), *aff’d*, 542 F.2d 800 (9th Cir. 1976).

In a prosecution for violating federal statute proscribing convicted felon from possessing or receiving firearm in commerce, it was no defense that defendant, who had pleaded

guilty to charge of burglary in state court and had been placed on probation, was advised by a public defender that he was not a convicted felon because he had received a withheld judgment in the burglary case. *United States v. Locke*, 409 F. Supp. 600 (D. Idaho), *aff'd*, 542 F.2d 800 (9th Cir. 1976).

In General.

If a sentence has been suspended or withheld, subsection (1) of this section gives the district court discretion to terminate the sentence or set aside the plea of guilty or conviction of the defendant, or dismiss the case and discharge the defendant. If a sentence has been suspended pursuant to § 19-2601(4), subsection (2) of this section gives the district court discretion to amend the judgment of conviction from a term in the custody of the state board of correction to confinement in a penal facility for the number of days served prior to suspension, and to deem the amended judgment a misdemeanor conviction. Nowhere in this section is there a provision for relief from a commuted sentence. *State v. Wiedmeier*, 121 Idaho 189, 824 P.2d 120 (1992).

Partial Expungement.

This section creates a special procedure whereby a successful probationer who has been convicted of a felony can request the district court to amend the judgment so that the harsh consequences of a felony conviction can be avoided. The procedure might best be described as a statutory partial expungement. *Housley v. State*, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991).

Persistent Violators.

This section is not intended to apply to habitual criminals or to a class of persons who indicate by their persistency in the commission of crime that nothing short of actual restraint will deter them from committing

other offenses. In *re France*, 38 Idaho 627, 224 P. 433 (1924).

A person whose DUI charge is dismissed pursuant to this section is considered a person who previously has pled guilty or has been found guilty of DUI for purposes of the penalty-enhancing statute, subsection (4) of § 18-8005, applicable to repeat DUI offenders. *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991).

Probation.

Where maximum sentence for conviction for drawing a check without funds was six months at the time the crime was committed, judgment placing defendant on probation for two years was excessive, but judgment of probation was valid for period of six months. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

Retained Jurisdiction.

This section did not grant authority to a trial court to dismiss a case after completion of probation granted pursuant to § 19-2601(4) during retained jurisdiction; the trial court only had the authority to amend the judgment to reflect confinement in a penal facility for the time defendant served and to deem the conviction a misdemeanor. *State v. Funk*, 123 Idaho 967, 855 P.2d 52 (1993).

Timeliness of Motion.

Unless the state can show that it has been caused substantial prejudice by defendant's delay of ten years in filing his motion under this section, the motion must be considered timely. *Housley v. State*, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991).

Collateral References. Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction. 97 A.L.R.5th 293.

19-2605. Powers of judge at chambers. — The powers hereby conferred upon the district court may be exercised by the judge thereof at chambers. [1915, ch. 104, part of § 1, p. 245; *reen.* C.L., § 8003; C.S., § 9047; I.C.A., § 19-2507.]

Cited in: *Ex parte Medley*, 73 Idaho 474, 253 P.2d 794 (1953).

19-2606. Paroled or suspended offender — Duty to report — Order on report. — It shall be the duty of each person whose sentence is suspended or who is paroled under the provisions of this chapter to appear, or report, at one or more of the regular terms each year, of the court granting the parole or suspending the execution of the judgment, as ordered by the court, during the continuance of such probation, and furnish at his own expense, proof, in writing, to the satisfaction of the court, that he has, since

he was placed on probation or since the last date at which proof has been furnished, complied with the terms and conditions upon which he was placed on probation by the court. The court shall make each report so made, a part of the court record of the case, and shall, after considering the same, enter an order approving or rejecting the same, and the court may, if the report is not found to be satisfactory, and as ordered by the court, vacate the order of parole, or suspension of sentence, and may then order execution of the judgment as though parole or suspension had not been made. [1915, ch. 104, § 2, p. 245; reen. C.L., § 7999; C.S., § 9043; am. 1929, ch. 100, § 1, p. 163; I.C.A., § 19-2503.]

19-2607. Parole secured by misrepresentation. — If at any time after suspension of sentence it shall appear to the district judge that the order suspending sentence was obtained by fraud, perjury or by any sort of misrepresentation or suppression of facts, or that the accused has failed or neglected to have a fixed place of abode and a regular occupation, the district judge shall issue a warrant for his apprehension and shall remand him for sentence. [1915, ch. 104, § 3, p. 245; reen. C.L., § 7998; C.S., § 9042; I.C.A., § 19-2502.]

Failure to Object to Conditions.

Failure of a probationer to object to the conditions of his probation at the time they are imposed does not estop him from urging that a condition is impossible for him to fulfill at a hearing on a motion for revocation of his

probation for violation of such condition, unless the impossibility of fulfilling such condition was concealed by the probationer when placed on probation. *State v. Oyler*, 92 Idaho 43, 436 P.2d 709 (1968).

19-2608. Payment of court ordered tests of breath or bodily fluids. — Whenever a court orders testing of breath or bodily fluids as a condition of probation, such costs for the tests shall be paid for by the probationer to the governmental agency providing the testing, provided the court may waive this requirement upon a showing of cause. [I.C., § 19-2608, as added by 1994, ch. 248, § 1, p. 792.]

CHAPTER 27

EXECUTION

SECTION.

- 19-2701. Authority for execution of judgment.
- 19-2702. Execution on judgment for fine.
- 19-2703. Execution of judgment of imprisonment.
- 19-2704. Delivery of defendant to penitentiary guard.
- 19-2705. Death sentence or death warrant and confinement thereunder — Access to condemned person.
- 19-2706. [Amended and Redesignated.]
- 19-2707. [Repealed.]
- 19-2708. Suspension of judgment of death.
- 19-2709 — 19-2712. Inquiry into defen-

SECTION.

- 19-2710. Defendant's sanity — Procedure. [Repealed.]
- 19-2713. Proceedings when female supposed to be pregnant.
- 19-2714. Finding in case of pregnancy.
- 19-2715. Ministerial actions relating to stays of execution, resetting execution dates, and order for execution of judgment of death.
- 19-2716. Infliction of death penalty.
- 19-2717. [Repealed.]
- 19-2718. Return of death warrant.
- 19-2719. Special appellate and post-conviction procedure for capital cases — Automatic stay.

SECTION.

19-2719a. Applicability of §§ 19-2705, 19-2708, 19-2714, 19-2715, 19-2719.

SECTION.

[19-2720]. Inquiry into need for new counsel.

19-2701. Authority for execution of judgment. — When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution. [Cr. Prac. 1864, § 450; R.S., R.C., & C.L., § 8005; C.S., § 9048; I.C.A., § 19-2601.]

Cross ref. Stay of execution, I.C.R. 38.

arate sentence which runs consecutively. 68 A.L.R.2d 712.

Excessive Sentence.

Any part of sentence in excess of court's jurisdiction will be disregarded as surplusage, so long as valid part may be severed from invalid part. *Ex parte Jennings*, 46 Idaho 142, 267 P. 227 (1928).

Collateral References. 21A Am. Jur. 2d, Criminal Law, §§ 939 — 975.

24 C.J.S., Criminal Law, §§ 1458-1505, 1589, 1590.

Effect of invalidation of sentence upon sep-

Indulgency of offender as affecting validity of imprisonment as alternative to payment of fine. 31 A.L.R.3d 926.

Comment note on length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 A.L.R.3d 335.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part. 73 A.L.R.3d 474.

19-2702. Execution on judgment for fine. — If the judgment includes the payment of a fine, or costs, or fine and costs, or other monetary sums, execution may be issued thereon for such sums as on a judgment in a civil action. [Cr. Prac. 1864, § 451; R.S., § 8006; am. 1899, p. 379, § 3; reen. R.C. & C.L., § 8006; C.S., § 9049; I.C.A., § 19-2602; am. 1995, ch. 205, § 1, p. 700.]

Compiler's notes. Section 2 of S.L. 1995, ch. 205 declared an emergency. Approved March 17, 1995.

Cross ref. Execution in civil actions, § 11-301.

Cited in: *In re Schuster*, 25 Idaho 465, 138 P. 135 (1914); *State v. Anderson*, 31 Idaho 514, 174 P. 124 (1918); *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Imprisonment.

Judgment of imprisonment with imposition of fine and costs, may require defendant's imprisonment for fine and costs in addition to sentence. *State v. Anderson*, 31 Idaho 514, 174 P. 124 (1918).

19-2703. Execution of judgment of imprisonment. — If the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with. [Cr. Prac. 1864, § 452; R.S., R.C., & C.L., § 8007; C.S., § 9050; I.C.A., § 19-2603.]

Cited in: *State v. Anderson*, 31 Idaho 514, 174 P. 124 (1918); *Killeen v. Vernon*, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

ANALYSIS

Putting affairs in order.
Witness fees.

Putting Affairs in Order.

If the trial courts intend to give a defendant time to get his affairs in order prior to commencing serving his sentence, the court should delay the imposition of that sentence until the end of the period of time that the defendant is allowed free to get his affairs in

order. *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980).

Witness Fees.

Where defendant procures witnesses in his defense at public expense he may not be imprisoned for same. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Collateral References. Imposition or enforcement of sentence which has been suspended without authority. 141 A.L.R. 1225.

What constitutes commencement of service of sentence, depriving court of power to change sentence. 159 A.L.R. 161.

Power of state court, during same term, to increase severity of lawful sentence — modern status. 26 A.L.R.4th 905.

Power of trial court to increase severity of unlawful sentence — modern status. 28 A.L.R.4th 147.

19-2704. Delivery of defendant to penitentiary guard. — If judgment is for imprisonment in the state prison, or for the infliction of the death penalty, the sheriff of the county must, upon receipt of the certified copy of judgment, hold the prisoner in his custody until demand for such prisoner is made upon him by the duly authorized guard of said prison, who may be sent to convey such prisoner to the state prison. When such demand is made upon the sheriff by said guard, the sheriff shall deliver the prisoner and said copy of the judgment to said guard, and take a receipt from said guard for the prisoner and said copy of the judgment. [R.S., § 8008; am. 1899, p. 340, § 2; reen. R.C. & C.L., § 8008; C.S., § 9051; I.C.A., § 19-2604.]

19-2705. Death sentence or death warrant and confinement thereunder — Access to condemned person. — (1) Whenever a person is sentenced to death, the judge passing sentence shall, in accordance with section 19-2719, Idaho Code, sign and file a death warrant fixing a date of execution not more than thirty (30) days thereafter.

(2) The warrant shall be directed to the director of the Idaho department of correction and shall be delivered to him forthwith.

(3) Whenever a person is under death warrant, execution of which has not been stayed, the warden of the prison in which the person is incarcerated shall keep the condemned person in solitary confinement until execution. No person shall be allowed access to the condemned person except law enforcement personnel investigating matters within the scope of their duties, the attorney of record, attending physicians, a spiritual adviser of the condemned's choosing, and members of the immediate family of the condemned, and then only in accordance with prison rules. Persons under death warrant will be allowed contact visits with their attorneys of record and the agents of their attorneys of record. Such visits will take place subject to prison rules. No other contact visits shall be permitted. Prison officials have authority to suspend or deny visits when the safe, secure and orderly operation of the facility or public safety could be compromised.

(4) For purposes of this section a "contact visit" is defined as a meeting between a condemned person and another person during which the parties are not separated by a screen or other partition which prohibits physical contact. Contact visits with attorneys of record or agents of the attorneys of record will take place in a private, confidential setting where the prisoner and his attorney are in the same room.

(5) For the purposes of this section, "agents of the attorneys of record" means employees of the attorneys of record including investigators, parale-

gals, legal interns and mitigation specialists but does not include retained experts or other independent contractors of the attorneys of record.

(6) For the purposes of this section, "legal intern" means a qualified law student or recent law school graduate who, upon application and approval by the Idaho state bar association, is granted a limited license to engage in the practice of law.

(7) No person shall be allowed access to the condemned person under death warrant except law enforcement personnel investigating matters within the scope of their duties, the condemned person's attorneys of record, the agents of the condemned person's attorneys of record, attending physicians, spiritual advisers of the condemned person's choosing and approved visitors.

(8) When a person has been sentenced to death, but the death warrant has been stayed, contact visits between the condemned person and persons other than his attorneys of record and the agents of the attorneys of record may be allowed at the discretion of prison officials.

(9) All visits, contact or noncontact, with a condemned person, whether such person is under sentence of death or death warrant, shall take place only in accordance with prison rules. Prison officials shall have the authority to suspend or deny such visits when public safety or the safe, secure and orderly operation of the prison could be compromised.

(10) In the seven (7) days immediately preceding the scheduled execution of a condemned person, the condemned person may have contact visits with spiritual advisers of the condemned person's choosing and members of the condemned person's family, in addition to the attorneys of record and the agents of the attorneys of record.

(11) When a person has been sentenced to death, but the death warrant has been stayed, the warden is not required to hold such person in solitary confinement or to restrict access to him until the stay of the death warrant is lifted or a new death warrant is issued by the sentencing court; provided however, no condemned person shall be housed in less than maximum security confinement, and provided further that nothing in this section shall be construed to limit the warden's discretion to house such person under conditions more restrictive if necessary to ensure public safety or the safe, secure and orderly operation of the facility.

(12) Nothing in this section shall be construed to create a liberty interest in the condemned person or to expand the right of access to courts under state or federal law. [I.C., § 19-2705, as added by 1999, ch. 285, § 2, p. 708.; am. and redsig. 2003, ch. 282, § 2, p. 765.]

Legislative Intent. Section 1 of S.L. 1999, ch. 285, reads: "The purpose of this act is to provide prisoners condemned to death with reasonable access to their attorneys and specified agents of their attorneys, subject to strict adherence to prison rules. The legislation authorizes noncontact visits between the condemned person and agents of the attorney of record and contact visits between the condemned person and his attorney of record. The Legislature recognizes that providing at-

torneys access to clients on death row is necessary if the client is to obtain a fair and adequate defense. The Legislature further recognizes that under American jurisprudence an adequate defense of a death penalty inmate is an interdisciplinary endeavor requiring the skills of counsel, experts, investigators and paralegals working together on the convict's behalf. Each member of the team must have access to the client if the client is to be represented competently and fairly. The

Legislature also recognizes that prison administrators must be free to exercise professional discretion in determining the steps necessary to ensure the orderly functioning of the facility and to secure the safety of prison staff, inmates and visitors. Prison administrators are under an obligation to take reasonable measures to guarantee public safety and must be alert to and prevent, so far as possible, any attempts to introduce drugs, contraband or illicit weapons into the prisons. It is critical that prison administrators maintain the necessary discretion and control of prison functions, including outside access to prisoners, especially those condemned to death. In authorizing attorneys and their agents access to their clients on death row and in permitting attorneys to have contact visits with their clients, it is the intent of the Legislature that such visits occur in strict accordance with prison rules and subject to the authority of prison officials to suspend or deny those visits if the safe, secure and orderly operation of the facility or the public safety could be compromised."

Compiler's notes. This section was formerly compiled as § 19-2706.

Former § 19-2705, as added by 1984, ch. 159, § 2, p. 386, was amended and redesignated as § 19-2706 by § 3 of S.L. 1999, ch. 285.

Former § 19-2705, which comprised I.C., § 19-2705, as added by 1999, ch. 285, § 2, p. 708, was repealed by S.L. 2003, ch. 282, § 2, effective July 1, 2003.

Section 4 of S.L. 1999, ch. 285 declared an emergency. Approved March 24, 1999.

Collateral References. Power to change time for commencement of sentence. 3 A.L.R. 1572.

Power of court to change sentence after commitment or payment of fine. 168 A.L.R. 706; 26 A.L.R.4th 905; 28 A.L.R.4th 147.

Effect of delay in taking defendant into custody after conviction and sentence. 76 A.L.R.5th 485.

Validity of rules and regulations concerning viewing of execution of death penalty. 107 A.L.R.5th 291.

19-2706. [Amended and Redesignated.]

Compiler's notes. This section was amended and redesignated as § 19-2705 by S.L. 2003, ch. 282.

19-2707. Transmission of statement of murder convict to governor — Opinion on statement. [Repealed.]

Compiler's notes. This section, which comprised Cr. Prac. 1864, § 455; R.S., R.C., & C.L., § 8010; C.S., § 9053; I.C.A., § 19-2606,

was repealed by S.L. 1984, ch. 159, § 3, effective April 2, 1984.

19-2708. Suspension of judgment of death. — No judge, court or officer, can suspend the execution of a judgment of death, except as provided in sections 19-2715 and 19-2719, Idaho Code. [Cr. Prac. 1864, § 456; R.S., R.C., & C.L., § 8012; C.S., § 9055; I.C.A., § 19-2608; am. 1984, ch. 159, § 4, p. 386.]

Compiler's notes. Section 3 of S.L. 1984, ch. 159 contained repeals and section 5 is compiled as § 19-2714.

Cross ref. Governor may grant respites or reprieves in all cases of convictions for offenses against the state except treason or

conviction in impeachment, but such respite or reprieve shall not extend beyond the next session of the board of pardons, Const., art. 4, § 7.

Stay of execution, I.C.R. 38.

19-2709 — 19-2712. Inquiry into defendant's sanity — Procedure. [Repealed.]

Compiler's notes. These sections, comprising Cr. Prac. 1864, §§ 457-460; R.S., R.C., & C.L., §§ 8013-8016; C.S., §§ 9056-9059;

I.C.A., §§ 19-2609 — 19-2612, were repealed by S.L. 1970, ch. 31, § 15.

19-2713. Proceedings when female supposed to be pregnant. — If there is good reason to suppose that a female against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, may summon a jury of three (3) physicians to inquire into the supposed pregnancy. Immediate notice thereof must be given to the prosecuting attorney of the county, and the provisions of sections 19-2710, 19-2711 apply to the proceedings upon the inquisition. [Cr. Prac. 1864, § 462; R.S., R.C., & C.L., § 8017; C.S., § 9060; I.C.A., § 19-2613.]

Compiler's notes. Sections 19-2710 and 19-2711, referred to in this section, have been repealed.

19-2714. Finding in case of pregnancy. — If it is found by the report that the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant, the warden must suspend the execution of the judgment, and transmit the report to the district court that imposed the sentence. When the district court that imposed the sentence is satisfied that the female is no longer pregnant, he may issue his warrant appointing a day for the execution of the judgment. [Cr. Prac. 1864, §§ 463, 464; R.S., R.C., & C.L., § 8018; C.S., § 9061; I.C.A., § 19-2614; am. 1984, ch. 159, § 5, p. 386.]

Compiler's notes. Section 4 of S.L. 1984, ch. 159 is compiled as § 19-2708.

19-2715. Ministerial actions relating to stays of execution, resetting execution dates, and order for execution of judgment of death. — (1) Hereafter, no further stays of execution shall be granted to persons sentenced to death except that a stay of execution shall be granted during an appeal taken pursuant to section 19-2719, Idaho Code, and during the automatic review of judgments imposing the punishment of death provided by section 19-2827, Idaho Code.

(2) Upon remittitur after a sentence of death has been affirmed, the district court shall set a new execution date not more than thirty (30) days thereafter.

(3) If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the prosecuting attorney, must order the defendant to be brought before it, or if he is at large a warrant for his apprehension may be issued. Upon the defendant being brought before the court, the court must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden execute the judgment at a special specified time. The warden must execute the judgment accordingly.

(4) Action of the district court under this section is ministerial only. No hearing shall be required for setting a new execution date and the court shall inquire only into the fact of an existing death sentence and the absence of a valid stay of execution. [Cr. Prac. 1864, §§ 465, 466; R.S., § 8019; am. 1899, p. 340, § 4; reen. R.C. & C.L., § 8019; C.S., § 9062; I.C.A., § 19-2615; am. 1984, ch. 159, § 6, p. 386.]

Compiler's notes. Section 7 of S.L. 1984, ch. 159 is compiled as § 19-2719.

Sec. to sec. ref. This section is referred to in § 19-2708.

ANALYSIS

Death of trial judge.

Duty of trial judge.

Death of Trial Judge.

On the death of the trial judge after conviction and death sentence any judge of the district may carry the sentence to execution

pursuant to this section. *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

Duty of Trial Judge.

The facts which this section requires the court to inquire into relate exclusively to whether there are legal reasons against execution of judgment, such as pardon or commutation of sentence, and the identity of defendant. *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937).

Collateral References. Effect of permitting day fixed for execution to pass without carrying out sentence. 34 A.L.R. 314.

19-2716. Infliction of death penalty. — The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbituate in combination with a chemical paralytic agent until death is pronounced by a physician licensed under the provisions of chapter 18, title 54, Idaho Code, in accordance with accepted medical standards. The director of the department of corrections shall determine the substance or substances to be used and the procedures to be used in any execution; provided, however, that, in any case where the director finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure that infliction of death by administration of such substance or substances can be carried out in a manner which causes death without unnecessary suffering, the sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director; and provided further, that any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the director or his designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. This act shall apply to all executions carried out on and after the effective date [March 31, 1982] of this enactment, irrespective of the date sentence was imposed. [Cr. Prac. 1864, § 467; R.S., R.C., & C.L., § 8020; C.S., § 9063; I.C.A., § 19-2616; am. 1978, ch. 70, § 1, p. 140; am. 1982, ch. 257, § 1, p. 668.]

Compiler's notes. Section 2 of S.L. 1982, ch. 257 declared an emergency. Approved March 31, 1982.

Cited in: *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

Delegation of Power.

The legislature did not improperly delegate the power to inflict the death penalty to the board of corrections under this section since the standards formulated for guidance, although general, are capable of reasonable

application and it cannot be assumed that the director of the department of corrections will act in other than a reasonable manner. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

Collateral References. Manner of inflicting death sentence as cruel or unusual punishment. 30 A.L.R. 1452.

Validity of rules and regulations concerning viewing of execution of death penalty. 107 A.L.R.5th 291.

19-2717. Infliction of death penalty — Duties of the board of state prison commissioners. [Repealed.]

Compiler's notes. This section, which comprised R.S., § 8021; am. 1899, p. 340, § 5; reen. R.C. & C.L., § 8021; C.S., § 9064; I.C.A., § 19-2617; am. 1941, ch. 150, § 2, p. 303 was repealed by S.L. 1978, ch. 70, § 2.

19-2718. Return of death warrant. — After the execution, the executioner must make a return upon the death warrant, showing the time, mode and manner in which it was executed. [R.S., § 8022; am. 1899, p. 340, § 6; reen. R.C. & C.L., § 8022; C.S., § 9065; I.C.A., § 19-2618; am. 1941, ch. 150, § 3, p. 303.]

19-2719. Special appellate and post-conviction procedure for capital cases — Automatic stay. — The following special procedures shall be interpreted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence.

(1) When the punishment of death is imposed the time for filing an appeal shall begin to run when the death warrant is filed.

(2) The death warrant shall not be filed until forty-two (42) days after the judgment imposing the death sentence has been filed, or, in the event a post-conviction challenge to the conviction or sentence is filed, until the order deciding such post-conviction challenge is filed.

(3) Within forty-two (42) days of the filing of the judgment imposing the punishment of death, and before the death warrant is filed, the defendant must file any legal or factual challenge to the sentence or conviction that is known or reasonably should be known.

(4) Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section. The special procedures for fingerprint or forensic DNA testing set forth in sections 19-4901(a)(6) and 19-4902(b) through (f), Idaho Code, are fully applicable in capital cases and are subject to the procedures set forth in this section, and must be pursued through a petition filed within the time limitations of subsection (3) of this section or by July 1, 2002, whichever is later.

(5) If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

(a) An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

(b) A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence.

(c) A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law.

(6) In the event the defendant desires to appeal from any post-conviction order entered pursuant to this section, his appeal must be part of any appeal taken from the conviction or sentence. All issues relating to conviction, sentence and post-conviction challenge shall be considered in the same appellate proceeding.

(7) If post-conviction challenge is made under this section, questions raised thereby shall be heard and decided by the district court within ninety (90) days of the filing of any motion or petition for relief timely filed as provided by this section. The court shall give first priority to capital cases. In the event the district court fails to act within the time specified, the supreme court of Idaho shall, on its own motion or the motion of any party, order the court to proceed forthwith, or if appropriate, reassign the case to another judge. When the supreme court intervenes as provided, it shall set a reasonable time limit for disposition of the issues before the district court.

(8) The time limit provided in subsection (7) of this section for disposition of post-conviction claims may be extended only upon a showing of extraordinary circumstances which would make it impossible to fairly consider defendant's claims in the time provided. Such showing must be made under oath and the district court's finding that extraordinary circumstances exist for extending the time shall be in writing and shall be immediately reported to the supreme court, which shall at once independently consider the sufficiency of the circumstances shown and determine whether an extension of time is warranted.

(9) When a judgment imposing the penalty of death is filed, the clerk and the reporter shall begin preparation of the transcripts of the trial, and other proceedings, and the clerk's transcript.

(10) When the procedures specified in this section and section 19-2827, Idaho Code, have been carried out and a remittitur issued, and an execution date set as provided by law, the defendant shall be deemed to have exhausted all state remedies.

(11) Any successive petition for post-conviction relief not within the exception of subsection (5) of this section shall be dismissed summarily. Notwithstanding any other statute or rule, the order of dismissal shall not be subject to any motion to alter, amend or reconsider. Such order shall not be subject to any requirement for the giving of notice of the court's intent to dismiss. The order of dismissal shall not be appealable.

(12) A stay of execution while the special appellate procedures specified herein are followed and during the pendency of automatic review of death sentences shall be automatically entered by the clerk of the supreme court at the time the district court transmits to the supreme court the report required by section 19-2827, Idaho Code. If the sentence is upheld, the clerk

shall dissolve such stay when the remittitur is filed. Thereafter the district court shall set a new execution date. [I.C., § 19-2719, as added by 1984, ch. 159, § 7, p. 386; am. 1995, ch. 140, § 3, p. 594; am. 2001, ch. 317, § 1, p. 1126.]

Compiler's notes. Section 6 of S.L. 1984, ch. 159 is compiled as § 19-2715.

Section 1 of S.L. 1995, ch. 140 is compiled as § 19-2515 and section 2 contained a repeal.

Section 2 of S.L. 2001, ch. 317 is compiled as § 19-4901.

Sec. to sec. ref. This section is referred to in §§ 19-2515A, 19-2705, 19-2708 and 19-2715.

Cited in: *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993); *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992); *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994); *Fetterly v. Paskett*, 997 F.2d 1295 (9th Cir. 1993), cert. denied, 513 U.S. 914, 115 S. Ct. 290, 130 L. Ed. 2d 205 (1994).

ANALYSIS

Application.

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Application.

If necessary to avoid delay in carrying out a valid death sentence, the district court may sever non-death issues from death issues in post-conviction proceedings. This section applies only to claims challenging the death sentence itself. The Uniform Post-Conviction Procedure Act (UPCPA) covers all post-conviction claims that do not involve the death sentence. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

Capital Cases.

This section does not eliminate the applicability of the Uniform Post-Conviction Procedure Act (UPCPA) to capital cases, but it supersedes the UPCPA to the extent that their provisions conflict. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

—Proceedings Civil in Nature.

Proceedings in capital cases under Post Conviction Procedure Act remain civil in nature and are therefore governed by the Rules of Civil Procedure. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

Constitutionality.

There is no obviously invidiously discriminatory classification in this section. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

This section, which provides special expedited procedures for post conviction review in capital cases, does not involve a suspect class within the meaning of the United States Constitution or the Idaho Constitution, and accordingly strict scrutiny is not required. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

This section did not violate the defendant's constitutional right to equal protection, and the trial court correctly denied defendant's post conviction petition. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

The 42-day time limit provided by this section for filing post-conviction petitions did not unconstitutionally deny a defendant access to the courts; the time frame is proper given the needs of the state. *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), rev'd on other grounds, 997 F.2d 1295 (9th Cir. 1993).

There is no violation of the equal protection clause of the Fourteenth Amendment by the fact that non-capital prisoners have up to five years to file post-conviction petitions, while capital prisoners have only 42 days. *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), rev'd on other grounds, 997 F.2d 1295 (9th Cir. 1993).

The expedited procedure for post-conviction review in capital cases has a rational basis and thus does not violate a capital petitioner's

equal protection rights. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074, overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

This section does not violate the defendant's constitutional rights under equal protection analysis. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

This section provides an adequate process to ensure that death sentences are not carried out so as to arbitrarily deprive a defendant of his life, therefore it is not unconstitutional under due process analysis. *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), cert. denied, 506 U.S. 1047, 113 S. Ct. 962, 122 L. Ed. 2d 119 (1993).

Although the current statutory scheme establishes no timeliness bar to claims for ineffective assistance of counsel in noncapital cases, application of this section's 42-day time limit bar in capital cases is not unconstitutional. *Lankford v. State*, 127 Idaho 100, 897 P.2d 991 (1995).

The court on appeal declined to consider the arguments raised by appellant regarding the constitutionality of this section for the first time on appeal, where there did not appear that there were any subsequent proceedings in this case. *Porter v. State*, 136 Idaho 257, 32 P.3d 151 (2001).

—Standard.

The validity of this section must be tested on the rational basis test standard. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

This section would meet even the means-focus analysis, if that standard were applicable. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

Construction.

The Idaho Supreme Court has strictly construed the waiver provision of this section. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

Disqualification of Judge.

Where convicted capital murder defendant presented no evidence of the possibility that the district judge being a potential witness in a post-conviction proceeding interfered with the district judge's decision-making, the district judge did not err by not disqualifying himself from determining whether defendant satisfied the prima facie burden under this

section. *Lankford v. State*, 127 Idaho 100, 897 P.2d 991 (1995).

Exhaustion of State Remedies.

Petitioner's claim that his attempt to raise new claims should be allowed in state court despite this section, because the statute provides an exception for claims "reasonably unknown" at the time of filing, and that he has an explanation for his previous failure to raise his unexhausted claims — ineffective assistance of appellate and post-conviction counsel, failed to provide him the access to the state court, for in his previous appeal from the denial of post-conviction relief in state court, the Idaho Supreme Court refused to consider petitioner's claims newly raised in the post-conviction proceeding; therefore petitioner's state remedies were exhausted because a state procedural statute denied petitioner the right to present claims in the state court. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

Known Claims.

Courts could not entertain a successive petition for post-conviction relief which raised claims that were known by a petitioner at the time of a prior petition, but were voluntarily not pursued at that time. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

Dismissal of defendant's appeal and post-conviction petition were proper where defendant failed to show that she did not know or could not have reasonably previously known of any of the issues she raised in her successive petitions, because this section provides that in a death penalty case, the defendant must raise all claims for post-conviction relief that are known or reasonably should be known in one post-conviction proceeding filed within 42 days after the entry of the judgment imposing the death sentence. *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001).

Nature and Extent of Available Relief.

Based on the Idaho precedents which determine that, for the purpose of challenging the validity of a conviction, the writ of habeas corpus in Idaho has been replaced by post-conviction relief proceedings under § 19-4901, petitioner cannot turn to the writ of habeas corpus in a capital case to challenge the validity of his conviction. His remedies are limited by the statutory procedures set out in this section. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

Where petitioner completed a direct appeal and already has utilized one state post-conviction relief proceeding, he is barred by this section from a return to state court to raise newly discovered claims. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

A petitioner bringing a successive petition for post-conviction relief has a heightened

burden and must make a prima facie showing that issues raised in that petition fit within the narrow exception provided by the statute. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

Fact-specific claims based on alleged irregularities that occurred in case and legal arguments of general applicability in all similar cases, were of a type that should have immediately been apparent upon the completion of trial and sentencing, and defendant made no attempt to establish why claims were not and could not have been raised in his first petition for post-conviction relief. Therefore, claims were forfeit. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

Post-Conviction Relief.

This section provides a defendant one opportunity to raise all challenges to the conviction and sentence in a petition for post-conviction relief, except in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by this section. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the Idaho legislature enacted this section changing the statutory limitations period and post-conviction procedures, the change did not materially affect any substantive rights of defendant, and where this change was in effect when defendant filed his First Petition for Post-Conviction relief and the statutory limitations period had not yet run, the application of this section did not constitute an ex post facto application of the law. *Paradis v. State*, 128 Idaho 223, 912 P.2d 110 (1996).

Where the defendant provided no sound argument why his case for post-conviction relief required two attorneys, the district court's exercise of discretion in rejecting the request was not abuse. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Ineffective assistance of post-conviction counsel on defendant's first petition for post-conviction relief did not excuse defendant's failure to raise issues which reasonably should have been known and raised in that proceeding. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

Successive petitions for post-conviction relief which present only impeaching issues are facially insufficient pursuant to subsection (5)(b). *Pizzuto v. State*, 134 Idaho 793, 10 P.3d 742 (2000).

Dismissal of the applicant's post-conviction

claims alleging conflict of interest, ineffective assistance of post-conviction and appellate counsel, and newly discovered evidence was proper. *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000).

Idaho's forty-two day filing deadline effectively prevented defendant from timely raising his ineffective assistance of counsel claims. Most states permit defendants to file petitions for post-conviction relief following the completion of their direct appeals, and this bifurcated system allows for the appointment of new counsel, who can evaluate the record objectively to determine whether there are meritorious claims of ineffective assistance at trial and sentencing. *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), cert. denied, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001).

Supreme Court of Idaho dismissed inmate's third petition for post-conviction relief because the basis for his claims of ineffective assistance of counsel and a contention that the state withheld exculpatory evidence were known or should have been known to him in his earlier post-conviction petitions where his requests for funds to assess his trial counsel's effectiveness had already been granted and the notes the inmate claimed were withheld from him were actually attached to a report addressed to his post-conviction counsel on February 10, 1995; thus, according to the state, the inmate had possession of the notes by the time of his first post-conviction proceeding. *Porter v. State*, — Idaho —, 80 P.3d 1021 (2003).

—Waiver of Claims.

Because the witness testified to the state's actions in his deposition, the state's prosecutorial misconduct in allowing the witness's false testimony at trial to go uncorrected was an issue which reasonably should have been known at the time of the inmate's first petition; therefore, the inmate waived this issue under the provisions of subsection (5). *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000).

Denial of petition for post-conviction relief was upheld because petitioner either knew or should have known about the evidence at the time of his first appeal and his failure to raise the issue previously, waived the issue. *Pizzuto v. State*, 134 Idaho 793, 10 P.3d 742 (2000).

All claims made in defendant's successive petition for post-conviction relief were barred for failure to bring them within a reasonable time after they were discovered, where defendant did not show a justifiable reason for the six-month delay in filing. *Rhoades v. State*, 135 Idaho 299, 17 P.3d 243 (2000).

Inmate failed to raise the claims in a successive petition for postconviction relief within the time specified in this section be-

cause the inmate made no showing the claims were not known and could not reasonably have been known at the time the inmate filed the initial petition. *Creech v. State*, 137 Idaho 573, 51 P.3d 387 (2002).

Proportionality.

The fact that the Court vacated the death sentence of co-defendant based substantially upon his youth and lack of prior criminal involvement, did not render the death penalty imposed on defendant disproportionate since proportionality review must consider a broad spectrum of first degree murder cases, not just one other case and required comparing different human beings with different personalities, traits and backgrounds. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

Purpose.

This section and its special procedures were specifically enacted to accomplish the purpose of eliminating unnecessary delay in carrying out a valid death sentence and nothing therein could be described as obviously invidiously discriminatory; accordingly, the means-focus classification is inapplicable to this section. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

The legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

The 42-day requirement in this section was enacted to eliminate the additional delays and is clearly related to the objective of the statute. *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S. Ct. 1360, 103 L. Ed. 2d 827 (1989).

This section does not unconstitutionally deprive a defendant of equal protection of the laws because it requires post conviction petitions in death penalty cases to be filed within 42 days of the judgment imposing death, whereas in noncapital cases post conviction petitions may be filed within five years from expiration for the appeal. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3262, 106 L. Ed. 2d 607 (1989).

This section provides an adequate process to prevent erroneous results and to ensure that death sentences are not carried out so as to arbitrarily deprive a defendant of his life. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Review.

State court's dismissal of petitioner's ineffective counsel claims in second post-convic-

tion petition was grounded solely on a violation of the state's procedural rules and thus such claims were barred from habeas review. *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001).

Under this section, a claim alleging ineffective assistance of counsel at trial or sentencing, like other challenges to the petitioner's conviction and sentence, must be raised within 42 days of judgment; where the statutory provision clearly defines the relevant procedural requirements, and sufficiently identifies the class of defendants to which it applies, the enactment will be adequate under federal law to invoke the procedural bar to habeas corpus review. *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001).

Sworn Statements.

Where the post-conviction petition listed various issues that defendant desired to raise regarding the effectiveness of her appellate counsel, but it did not include sworn statements setting forth the material facts supporting those issues, the claims of ineffective assistance of appellate counsel on the appeal in defendant's criminal case were properly dismissed. *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001).

Time Limitation.

Trial court did not err in denying a motion to reduce sentence made by a defendant who was sentenced to death, where, although the motion was filed within the 120 days allowed by I.C.R. Rule 35, it was not filed within the 42-day time limitation of this section. *State v. Lankford*, 115 Idaho 796, 770 P.2d 805 (1989).

A careful reading of the Constitution of the State of Idaho and the legislature's codification of the Idaho Supreme Court's rule-making power reveals that the rule-making power goes to procedural, as opposed to substantive, rules; the Idaho Supreme Court has stated that "where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail"; however, because of the unique nature of the death penalty, as provided in chapter 27, title 19, Idaho Code, as well as the stringent constitutional protections afforded to a person sentenced to death, this section creates, defines, and regulates a primary right, and is a substantive rule; therefore, the forty-two (42) day time limitation of subsection (3) of this section applies to claims of illegality of a sentence of death, rather than a I.C.R. 35 procedural motion, to which no time limit applies. *State v. Beam*, 121 Idaho 862, 828 P.2d 891 (1992).

Where there had been no showing that the claims asserted in capital murder defendant's petition should not have been reasonably

known within 42 days of the judgment against him, defendant therefore failed to meet the prima facie requirements for maintaining an action for post-conviction relief under this section. *Lankford v. State*, 127 Idaho 100, 897 P.2d 991 (1995).

The time limitations contained in this section are jurisdictional in nature and specifically deprive the courts of Idaho of the power to consider any claims for relief that have been waived. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

Plaintiff could not have known until after the expiration of the forty two days following the filing of the judgment sentencing him to death that no post conviction relief application had been filed on his behalf; therefore filing within forty two days after appointment of new counsel was a reasonable time for filing of the petition. *Dunlap v. State*, 131 Idaho 576, 961 P.2d 1179 (1998).

Undisclosed Evidence.

Inmate's petition based on the suppression of exculpatory evidence was barred under the operation of subsection (5) of this section, where the state's withholding of exculpatory evidence was cumulative with evidence already within the possession of the defense at

the time when the inmate filed his first petition for post-conviction relief. *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000).

Unknown Claims.

—Burden of Proof.

This section places a heightened burden on the petitioner which requires a prima facie showing that the issues raised were not known and could not reasonably have been known within 42 days of judgment. *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993).

—Reasonable Time to Raise.

Claims that were not known or could not reasonably have been known within 42 days of judgment must be asserted within a reasonable time after they are known or reasonably could have been known. *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993).

—Waived.

The lapse of four years was not a reasonable period of time to assert claims that were not known or would not have reasonably been known within 42 days of judgment; therefore, petitioner's claims were waived. *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993).

19-2719a. Applicability of §§ 19-2705, 19-2708, 19-2714, 19-2715, 19-2719. — This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date [April 2, 1984] of this act but which have not been carried out, and to all capital cases arising after the effective date of this act. [I.C., § 19-2719a, as added by 1984, ch. 159, § 8, p. 386.]

Compiler's notes. The words "this act" refer to S.L. 1984, ch. 159, which is compiled as §§ 19-2705, 19-2708, 19-2714, 19-2715,

19-2719 and 19-2719a.

Section 9 of S.L. 1984, ch. 159 declared an emergency. Approved April 2, 1984.

[19-2720] 19-2719A. Inquiry into need for new counsel. — After the imposition of a sentence of death, the trial judge should advise the defendant that, upon a particularized showing that there is a reasonable basis to litigate a claim of ineffective assistance of trial counsel, new counsel may be appointed to represent the defendant to pursue such a claim in a post-conviction proceeding. If no such request is made, the trial judge shall certify of record that there are no facts that have come to the court's attention upon which such a claim could reasonably be based or, alternatively, the court may appoint new counsel. No deficiency in the application of the procedure described herein shall be grounds for relief from a judgment of conviction or from a sentence. [I.C., § 19-2719A, as added by 1995, ch. 140, § 4, p. 594.]

Compiler's notes. The bracketed section designation "19-2720" was inserted by the compiler since a § 19-2719a already exists.

Section 5 of S.L. 1995, ch. 140 is compiled as § 19-2818.

CHAPTER 28

APPEALS TO SUPREME COURT

SECTION.

- 19-2801. Criminal judgments and orders appealable — Time for taking appeals.
- 19-2802. Stay of execution — Custody of defendant.
- 19-2803. Record on appeal — Oral argument — Exhibits — Presentence report on appeal.

SECTION.

- 19-2804 — 19-2817. Appeal — Procedures. [Repealed.]
- 19-2818. Duties of the supreme court upon remand from a federal court.
- 19-2819 — 19-2826. Appeal — Procedures. [Repealed.]
- 19-2827. Review of death sentences — Preservation of records.

19-2801. Criminal judgments and orders appealable — Time for taking appeals. — An appeal may be taken to the Supreme Court from the district court in a criminal action by such parties from such judgments and orders of the district court, and within such times and in such manner as prescribed by Rule of the Supreme Court. [I.C., § 19-2801, as added by 1977, ch. 170, § 10, p. 436.]

Compiler's notes. Former §§ 19-2801 — 19-2803 which comprised Cr. Prac. 1864, §§ 468-471; R.S., §§ 8040-8042; R.C., §§ 8040-8042; am. 1915, ch. 150, § 1, p. 324; C.L., §§ 8040-8042; C.S., §§ 9066-9068; I.C.A., §§ 19-2701 — 19-2703 were repealed by S.L. 1977, ch. 170, § 9.

Section 8 of S.L. 1977, ch. 170 is compiled as § 13-203 and § 9 contained a repeal.

Cross ref. Persons who may appeal, I.A.R., Rule 4.

Juveniles, violent offenses, controlled substances violations new schools and offenses, § 20-509.

Cited in: State v. Wagenius, 99 Idaho 273, 581 P.2d 319 (1978); Reeves v. Reynolds, 112 Idaho 513, 733 P.2d 795 (Ct. App. 1987); State v. Peterson, 113 Idaho 554, 746 P.2d 1013 (Ct. App. 1987); Davis v. State, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

ANALYSIS

Appeal by right.

Attorney's failure to appeal.

Issues considered on appeal.

Jurisdiction of court.

Appeal by Right.

An order of the trial court suspending the execution of sentence and placing the defendant on probation is appealable by the State as a matter of right under I.A.R. 11(c)(6) and this section, rather than as a matter of discretion. State v. Greene, 102 Idaho 897, 643 P.2d 1067 (1982).

The right to appeal is purely a statutory right and is not a right guaranteed by any provision of the federal or state constitutions. State v. Murphy, 125 Idaho 456, 872 P.2d 719 (1994).

Attorney's Failure to Appeal.

Where the district court found that defendant's attorney had fulfilled his obligation to notify defendant of his right to appeal, of the options available, and had candidly discussed the probable results of each course of action, and the court further found that, although defendant may have "wanted to appeal," he failed to direct his attorney to, so the district court's findings, made after conducting the evidentiary hearing, are supported by substantial, even if conflicting, evidence. Fox v. State, 125 Idaho 672, 873 P.2d 926 (Ct. App. 1994).

Issues Considered on Appeal.

Where there is no record in the trial or the post-conviction proceeding that the eye-witness identifications of the defendant were impermissibly tainted by media publication of his photograph, any potential prejudice suffered by the defendant is merely speculative and does not rise to the level of fundamental error; thus, the issue will not be considered on appeal. State v. Fields, 127 Idaho 904, 908 P.2d 1211 (1995), cert. denied, 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (1995).

Jurisdiction of Court.

Because the question of jurisdiction on appeal from a conviction is fundamental, it must not be ignored when brought to the attention of the Court of Appeals, and should be addressed before considering the merits of the substantive appeal. State v. Rollins, 103 Idaho 48, 644 P.2d 370 (Ct. App. 1982).

Collateral References. Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases. 105 A.L.R.5th 529.

19-2802. Stay of execution — Custody of defendant. — An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases the judgment may be stayed by the district court or the Supreme Court as provided by Rule of the Supreme Court. Custody of the defendant shall be specified by the district court or in any order staying execution of the judgment. [I.C., § 19-2802, as added by 1977, ch. 170, § 11, p. 436.]

Compiler's notes. Former § 19-2802 was repealed. See compiler's notes, § 19-2801.

Cross ref. Stay of proceedings under appeal or certification, I.A.R., Rule 13.

Cited in: State v. Wilson, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983); State v. Wilson, 105 Idaho 679, 672 P.2d 247 (Ct. App. 1983).

19-2803. Record on appeal — Oral argument — Exhibits — Presentence report on appeal. — (a) The clerk's record and the reporter's transcript in an appeal of a criminal action to the supreme court shall contain such portions and documents of the proceedings of the district court, and be prepared, processed and transmitted to the supreme court as provided by rule of the supreme court. Argument of a criminal appeal shall be as prescribed by rule of the supreme court, but the defendant shall not have any right to appear at the time of oral argument unless otherwise ordered by the supreme court.

(b) In any case where a presentence report is relevant to any issue on appeal, and is transmitted to the supreme court or the court of appeals for such use, the clerk of the district court shall serve a copy of the report on the attorney general and on appellate counsel for the defendant.

(c) In any case where a documentary exhibit is transmitted to the supreme court or the court of appeals for use in appellate proceedings to which the state or any of its officers is a party in an official capacity, the clerk of the district court shall serve a copy of the exhibit on the attorney general and on appellate counsel for the defendant. [I.C., § 19-2803, as added by 1977, ch. 170, § 12, p. 436; am. 1986, ch. 124, § 1, p. 325; am. 2000, ch. 108, § 1, p. 238.]

Compiler's notes. Former § 19-2803 was repealed. See compiler's notes, § 19-2801.

Section 2 of S.L. 2000, ch. 108 declared an emergency. Approved March 30, 2000.

Cross ref. Augmentation and deletion of record, I.A.R., Rule 30.

Contents and arrangement of record, I.A.R., Rule 28.

Filing of record, I.A.R., Rule 29.

Oral argument, I.A.R., Rule 37.

Settlement of record, I.A.R., Rule 29.

Cited in: State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App. 1988).

Sufficiency of Record.

Where, on appeal from a final judgment, a reporter's transcript of the evidence was furnished and the appellant's brief made the requisite specification of errors, the court was obligated to determine whether the verdict was supported by the evidence. State v. Erwin, 98 Idaho 736, 572 P.2d 170 (1977).

19-2804 — 19-2817. Appeal — Procedures. [Repealed.]

Compiler's notes. These sections which comprised Cr. Prac. 1864, §§ 471 — 484; am. 1875, p. 363, § 468; R.S., §§ 8043 — 8051, 8056, 8057, 8062 — 8064; am. 1907, p. 508, § 1; R.C., §§ 8044-8051, 8056, 8057, 8062-

8064; am. 1915, ch. 146, p. 319; am. 1915, ch. 150, § 2, p. 325; C.L., §§ 8044-8051, 8056, 8057, 8062-8064; C.S., §§ 9069-9082; am. 1927, ch. 23, § 1, p. 28; am. 1927, ch. 25, § 1, p. 29; I.C.A., §§ 19-2704 — 19-2717; am.

1937, ch. 12, § 1, p. 23; am. 1943, ch. 22, § 1, p. 50; am. 1945, ch. 21, § 1, p. 28 were repealed by S.L. 1977, ch. 170, § 9. For present law see Idaho Appellate Rules, Rules 1 — 48.

19-2818. Duties of the supreme court upon remand from a federal court. — In the event a sentence of death is returned by a federal court for further proceedings in the state courts, the Idaho supreme court shall consider whether any legal or factual error alleged by a federal court may be corrected without remanding the cause to the district court and shall: (a) make any specific fact findings required by a federal court when such findings are implicit in the judgment of the district court, though not expressly stated; (b) correct any formal error that may be corrected by reference to the record without remanding to the district court for resentencing; (c) make such findings as may be necessary to uphold a death sentence and can be made on the record without remanding the cause to the district court for further proceedings. [I.C., § 19-2818, as added by 1995, ch. 140, § 5, p. 594.]

Compiler's notes. Former § 19-2818, which comprised Cr. Prac. 1864, § 485; R.S., R.C., & C.L., § 8605; C.S., § 9083; I.C.A., § 19-2718, was repealed by S.L. 1977, ch. 170, § 9. Section 4 of S.L. 1995, ch. 140 is compiled as § 19-2719A.

19-2819 — 19-2826. Appeal — Procedures. [Repealed.]

Compiler's notes. These sections which comprised Cr. Prac. 1864, §§ 486 — 491, 493; R.S., §§ 8070 — 8077; am. 1897, p. 73, § 1; reen. 1899, p. 305, § 1; am. 1907, p. 508, § 2; R.C., §§ 8070-8077; 9069; C.L., §§ 8070-8077, 9069; C.S., §§ 9084-9091; I.C.A., §§ 19-2719 — 19-2726; am. 1972, ch. 135, §§ 1-3, p. 300 were repealed by S.L. 1977, ch. 170, § 9. For present law see Idaho Appellate Rules, Rules 1 — 48.

19-2827. Review of death sentences — Preservation of records. — (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by section 19-2515(d)[2], Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and punishment prescribed. The report may be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Idaho.

(b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975. [I.C., § 19-2827, as added by 1977, ch. 154, § 5, p. 390; am. 1994, ch. 127, § 1, p. 285.]

Compiler's notes. The bracketed number "2" in subsection (a) was inserted by the compiler.

Sec. to sec. ref. This section is referred to in §§ 19-2715 and 19-2719.

Rule to sec. ref. This section is referred to in I.C.R. 33.2.

Cited in: State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); State v. Fain, 116 Idaho 82, 774 P.2d 252 (1989); State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989); State v. King, 120 Idaho 955, 821 P.2d 1010, 821 P.2d 1010 (Ct. App. 1991); State v. Fields, 127 Idaho 904, 908 P.2d 1211 (1995), cert. denied, 516 U.S. 922, 116 S. Ct. 319, 133 L. Ed. 2d 221 (1995); State v. Wood, 132 Idaho 88, 967 P.2d 702 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1768, 143 L. Ed. 2d 798 (1999); McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000); Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001), cert. denied, 534 U.S. 944, 122 S. Ct. 323, 151 L. Ed. 2d 241 (2001); Pizzuto v. Arave, 280 F.3d 949 (9th Cir. 2002).

ANALYSIS

Basis for claim.

Coconspirators.

Constitutionality.

Death penalty.

—Excessive.

—Proportionate and just.

Denial of review.

Factors considered.

—Effect of 1994 amendment.

Failure to object.

In general.

Influence of passion, prejudice or other arbitrary factor.

Reduction of codefendant's sentence.

Victim impact statement.

Basis for Claim.

Judicial rulings, standing alone, do not constitute a valid basis for a claim of bias or partiality. State v. Hairston, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Coconspirators.

The trial court did not commit error in sentencing the defendant to death while only sentencing the coconspirator to life imprisonment arising from the same first-degree murder, where the evidence showed that while both conspired to rob and kill the victim, it was the defendant who entrapped the victim and carried out the actual killing. State v. McKinney, 107 Idaho 180, 687 P.2d 570 (1984).

Given the prior criminal record, and the antisocial personality and lack of remorse shown by murder defendant, a sentence of death imposed on defendant was not disproportionate or unjust to the fixed life sentence given to a coconspirator. State v. Hoffman, 123 Idaho 638, 851 P.2d 934 (1993), cert. denied, 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

Constitutionality.

There is no federal constitutional requirement of jury participation in the sentencing process and that decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is

within the policy determination of the individual states; the policy judgment of the Idaho legislature, which places capital sentencing discretion in the district judges of the state with mandatory appellate review vested in Supreme Court, which has statewide jurisdiction, meets any test of constitutionality. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984).

In imposing death penalty, trial court's finding that defendant had poor chance for rehabilitation founded on court's impermissible reliance on defendant's past non-violent, consensual or involuntary sexual conduct violated defendant's rights under the Eighth Amendment. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Death Penalty.

Because § 19-2827 requires the Supreme Court to determine whether a sentence of death was imposed under the influence of any arbitrary factor, the court in *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied 511 U.S. 1060, concluded that the Idaho Supreme Court necessarily considers claims of error that fall within its obligatory review even if defendant has not raised those claims with specificity, thus a petitioner who alleges a sentencing error in the federal court may obtain habeas review even though the claim has not been fairly presented to the Idaho Supreme Court. *Hoffman v. A.J. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001).

—Excessive.

Where, according to the jury verdict, the defendant did not personally commit the crime of murder, but aided and abetted the commission of a felony murder, the defendant not only reported the crime to the police, but insisted upon taking them to the crime scene even when they disbelieved his story, he did not have a history of violent criminal conduct, and at the time of the crime, he was 18 years old and his mental age was 13.8 years, the death sentence as applied to the defendant was excessive. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

Where the defendant admitted that she aided her accomplice in trying to quiet the victim and she witnessed the stabbing of the victim, she testified that the stabbing occurred so quickly that she was powerless to stop it, there was never any contention that the defendant actually stabbed the victim, and the jury found the defendant guilty of felony murder, but acquitted her on the premeditated and deliberate murder charge, it was disproportionate for the defendant and

her accomplice to both receive the death penalty. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Where the defendant had no formal criminal record nor significant history of prior criminal activity, there was no history of violent criminal activity, nor was there an indication that the defendant possessed any propensity toward violence, the defendant cooperated with the authorities both after her arrest and during her incarceration, and she had skills and abilities which indicate she might ultimately be capable of maintaining employment and functioning as a productive member of society, the imposition of the death penalty was excessive. *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), cert. denied, 479 U.S. 964, 107 S. Ct. 463, 93 L. Ed. 2d 408 (1986).

Death penalty was ruled disproportionate to similar cases where defendant shot and killed a United States Forest Service Officer in a shoot-out following a robbery; defendant had no prior felony record, there was no evidence of alcohol or drug abuse, there was no evidence that defendant suffered from any mental or physical defect, defendant had lived and worked in several different places and had a high school education. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

—Proportionate and Just.

Where examination of cases dating back more than 50 years failed to disclose that any such remorseless, calculating, cold-blooded multiple murderer had ever been before the court, the death penalty imposed in this case was both proportionate and just. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1327, 79 L. Ed. 2d 722 (1984); see also *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1991).

In case involving stabbing, shooting and sexual molesting of victim, the heinous nature of the crime and the nature and character of the defendant, made the imposition of the death penalty both proportionate and just. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3591, 82 L. Ed. 2d 887 (1984), but see *State v. Sivak*, 119 Idaho 320, 806 P.2d 413 (1990).

Where victim was killed to insure her silence about the circumstances surrounding the murder of her companion, the imposition of the death penalty was both proportionate and just. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), cert. denied, 468 U.S. 1220, 104 S. Ct. 3592, 82 L. Ed. 2d 888 (1984).

The Supreme Court held that the death penalty for first-degree murder was neither excessive nor disproportionate where in no

other case had the court seen such a cold-blooded, callous and wanton plan to murder a relative stranger for the sole motive of monetary gain, coupled with the method of killing, i.e., enticement of the victim to a remote area, shots to the body, and then a deliberate and calculated placing of, execution fashion, shots to the back of the victim's head. *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984).

Imposition of the death penalty for the rape and murder of a 13-year-old girl, which was an extremely violent, atrocious and heinous offense, carried out with excessive cruelty, was not excessive or disproportionate to the penalty imposed in similar cases. *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2260, 90 L. Ed. 2d 704 (1986).

Where there was no indication that sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, the record supported the trial court's finding of aggravating circumstances, and the sentence was not disproportionate to the penalty imposed in other cases, the judgment of the district court imposing the death penalty would be affirmed. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), cert. denied, 479 U.S. 870, 107 S. Ct. 239, 93 L. Ed. 2d 164 (1986).

Where the record showed that the defendant was sadistic and assaultive and had tortured and raped others, the sentence of death was not out of proportion to the sentences imposed in other murder cases. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985).

The record in this case supported the finding of aggravating circumstances where the court found (1) that the acts of defendant involved a clearly thought out and unprovoked attack in a restaurant filled with innocent people who were not involved in any manner in the confrontation between the defendant and the victims, (2) that defendant emptied his gun in the direction of the three individuals with whom he had had words, while patrons and employees sought cover, and (3) that defendant had demonstrated no remorse, having read a prepared statement to the court to the effect that the killing of one victim and the shooting of the others was justified because defendant was verbally insulted by deceased victim. *State v. Paz*, 118 Idaho 542, 798 P.2d 1 (1990), cert. denied, 501 U.S. 1259, 111 S. Ct. 2911, 115 L. Ed. 2d 1074, overruled on other grounds, *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Sentence of death upon conviction for first degree murder, lewd and lascivious conduct with a minor and first degree kidnapping was not excessive or disproportionate where evi-

dence showed that defendant kidnapped nine year old girl, took her to a remote site, sexually molested her and then murdered her by taking her to a ditch and holding her head under water. *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the court found aggravating circumstances in that defendant committed a most heinous, atrocious and cruel murder of a nine year old girl after kidnapping her off the street and sexually assaulting her, thereby exhibiting utter disregard for human life and that the mitigating circumstance did not outweigh the aggravating factors, court understood holding in *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, cert. denied, 493 U.S. 922, 110 S. Ct. 287, 107 L. Ed. 2d 267 (1989) and applied § 19-2515 correctly; thus sentence of death was properly imposed. *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where the murders committed by defendant were intentional acts perpetrated upon two innocent campers, where defendant robbed them of their money and a few possessions and then unmercifully and callously murdered them, where they were found buried in shallow graves with their hands and feet bound after defendant had brutally beaten their heads with a hammer, where furthermore, the character and nature of these crimes leads to the conclusion that defendant is an extremely dangerous man who chose unsuspecting victims and murdered without provocation, and where the murders were committed in less than a year following defendant's release from a ten-year prison term for criminal sexual assault, these factors indicated that defendant has little respect for the law or for the lives of other human beings, and the sentences of death imposed on defendant were not disproportionate or unjust. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992); *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Where defendant kidnapped victim from the convenience store where she was working, forced her into a pickup truck and drove her to a secluded area where he attempted to attack her, the death sentence was not excessive or disproportionate. *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Where defendant killed victim by inflicting multiple knife wounds, several of which could have been the cause of her death, there were multiple slashes on part of her body and as part of the attack or following her death,

defendant made an anal cutting and removed certain of her organs, in comparing this crime and this defendant to similar crimes by other similar defendants, the death sentence was found not to be excessive or disproportionate. *State v. Leavitt*, 121 Idaho 4, 822 P.2d 523 (1991), cert. denied, *Leavitt v. Idaho*, 506 U.S. 972, 113 S. Ct. 460, 121 L. Ed. 2d 368 (1992).

Death sentence for defendant convicted of the felony murder of a bartender and bar patron was not disproportionate to other cases in which the imposition of the death penalty has been affirmed. *State v. Wells*, 124 Idaho 836, 864 P.2d 1123 (1993).

Death penalty was not excessive or disproportionate to penalty imposed in other similar cases where defendant who shot and killed a female bank teller during a bank robbery had some days earlier killed another woman with a cross-bow and had taken her car and credit card; defendant's psychiatric evaluation revealed he had an explosive personality and was motivated by rage and anger, the objects of which were generally women. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

Denial of Review.

The Supreme Court would not consider whether a defendant's death sentence was excessive where it had already ruled that the district court's findings weighing the aggravating and mitigating factors surrounding the murder were supported by the record. *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

Factors Considered.

Factors to be considered in a review under this section include examination of the sentence imposed, a comparison with sentences imposed in similar cases, and consideration of the nature of and the motive for the crime committed. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984).

There is no authority for the proposition that this state's failure to expend adequate funds for inmate services is a factor to be considered in imposing the death penalty. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), cert. denied, 479 U.S. 989, 107 S. Ct. 582, 93 L. Ed. 2d 585 (1986).

In determining whether a death sentence is disproportionate when compared to other cases in which the death sentence was or was not imposed, the Supreme Court considered: (1) The nature of, and the motive for, the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant to determine whether the sentence was proportionate and just. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992); *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied,

506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Before a state may base its decision to execute a defendant on his particular characteristics, the state must demonstrate that its reliance on such characteristics serves to further its interest in retribution, in deterrence, or in the elimination of those likely to kill again. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Supreme Court's affirmation of death penalty after review required by § 19-2827 constitutes at least an implicit rejection of claims of error which fall within its obligatory review even if defendant has not raised these claims with specificity. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

Using defendant's non-violent, consensual or involuntary sexual conduct as a basis for imposition of the death penalty served no legitimate retributive purpose. *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), cert. denied, 511 U.S. 1060, 114 S. Ct. 1631, 128 L. Ed. 2d 354 (1994).

—Effect of 1994 Amendment.

Because of the 1994 amendment to this section and because death sentence was released after July 1, 1994, the Supreme Court of Idaho would not review whether the sentence of death as applied to murder defendant was disproportionate to the penalty imposed in similar cases. *State v. Sivak*, 127 Idaho 387, 901 P.2d 494 (1995), cert. denied, 516 U.S. 1095, 116 S. Ct. 819, 133 L. Ed. 2d 763 (1996).

The 1994 amendment to this section removed the requirement of proportionality review. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied, 529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Failure to Object.

Where the defendant in a sentencing hearing following a guilty plea to a first-degree murder charge, acquiesced without objection to the use of the transcript of the preliminary hearing instead of introducing live witness testimony, such failure to object did not preclude the Supreme Court from considering an alleged error in using the transcript since this section mandates that the court examine not only the death sentence but also the procedure followed in imposing that sentence regardless of whether an appeal is even taken, and since the gravity of a death sentence and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

In General.

Where petitioner did not assert trial court's

refusal to allow counsel to be present for presentence investigation interview in any form in his appeal to Idaho Supreme Court and failed to allege that the court's adverse determination was in error and consequently did not allege that his rights under the Constitution had been violated, since such error was the type of error implicitly considered as part of the court's mandatory review under this section and was an error that occurred at petitioner's sentencing the claim was not procedurally defaulted in habeas corpus proceeding. *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001).

Influence of Passion, Prejudice or Other Arbitrary Factor.

The mere fact that the same judge presided at both the trial and at sentencing does not violate the command of subdivision (c)(1) of this section. *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

Reduction of Codefendant's Sentence.

A defendant given the death sentence did not have a right, for proportionality purposes, to have his sentence reviewed and vacated following a reduction of a codefendant's death sentence. *Fetterly v. Paskett*, 744 F. Supp. 966 (D. Idaho 1990).

Victim Impact Statement.

In conviction for first degree murder, lewd

and lascivious conduct with a minor and first degree kidnapping, where defendant was sentenced to death, while victim impact statements that consisted of a description of the emotional trauma suffered by the family and contained family members' opinions and characterizations of the crimes were erroneously admitted, since there was no indication that such statements were ever considered by the court or that they diverted the court from its primary function of considering the person being sentenced and not the victim or the victim's family such error was harmless. *State v. Fain*, 119 Idaho 670, 809 P.2d 1149 (1991), cert. denied, 504 U.S. 987, 112 S. Ct. 2970, 119 L. Ed. 2d 589 (1992).

Supreme Court was free to review the issue of the use of victim impact statements at the time of sentencing regardless of whether or not an objection was made at the trial court level. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), cert. denied, 503 U.S. 908, 112 S. Ct. 1268, 117 L. Ed. 2d 495 (1992); *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991), cert. denied, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Opinions of Attorney General. A proposed amendment to this section which would delete reference to comparative proportionality would not render Idaho's death penalty scheme unconstitutional, under either the federal or state constitutions. OAG 93-12.

CHAPTER 29

BAIL

SECTION.

- 19-2901. Admission to bail defined.
- 19-2902. Taking of bail defined.
- 19-2903. Capital offenses not bailable.
- 19-2904. Admittance to bail before conviction.
- 19-2905. Bail pending appeal from conviction in a criminal case.
- 19-2906. Nature of bail.
- 19-2907. Notice of application.
- 19-2908. What magistrate may admit to bail.
- 19-2909. Form of undertaking.
- 19-2910. Qualifications of bail.
- 19-2911. Justification of bail.
- 19-2912. Discharge of defendant on giving bail.
- 19-2913. Defendant to be taken before magistrate on arrest.
- 19-2914. Arrest of defendant for capital offense.
- 19-2915. Bail on habeas corpus.
- 19-2916. Undertaking after indictment — Form.
- 19-2917. Bail after indictment — Application of other sections.

SECTION.

- 19-2918. Increase or reduction of bail.
- 19-2919. Bail on appeal — Who may admit to.
- 19-2920. Bail on appeal — Qualifications and how put in — Undertaking.
- 19-2921. Deposit in lieu of bail.
- 19-2922. Deposit after bail.
- 19-2923. Deposit applied to payment of fines, fees and costs.
- 19-2924. Surrender of defendant by bail.
- 19-2925. Arrest of defendant for surrender.
- 19-2926. Return of deposit on surrender.
- 19-2927. Forfeiture of bail.
- 19-2928. Enforcement of forfeiture.
- 19-2929. Forfeiture of deposit.
- 19-2930. Recommitment of defendant after bail.
- 19-2931. Order for recommitment.
- 19-2932. Arrest for recommitment.
- 19-2933. Commitment to await judgment.
- 19-2934. Readmittance to bail.
- 19-2935. Who may take bail upon readmittance.

SECTION.

19-2936. Bail on recommitment — Form of undertaking.

SECTION.

19-2937. Bail on recommitment — Qualifications and how put in.

19-2901. Admission to bail defined. — Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail. [Cr. Prac. 1864, § 494; R.S., R.C., & C.L., § 8100; C.S., § 9092; I.C.A., § 19-2801.]

Cross ref. Bail for witnesses, I.C.R. 46.1. Bail or release on own recognizance, I.C.R. 46.

Cited in: In re Schuster, 25 Idaho 465, 138 P. 135 (1914); State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957); Franklin v. State, 87 Idaho 291, 392 P.2d 552 (1964); State v. Ybarra, 102 Idaho 573, 634 P.2d 435 (1981).

Collateral References. 8 Am. Jur. 2d, Bail and Recognizance, § 1 et seq. 8 C.J.S., Bail, § 1 et seq.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties. 23 A.L.R.2d 803.

Sexual psychopaths, bail pending determination of psychopathy under statutes relating to. 24 A.L.R.2d 350.

Failure to appear, in the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case. 29 A.L.R.2d 945.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petitioner to bail. 56 A.L.R.2d 668.

Death of principal as defense available to sureties on bail or appearance on. 63 A.L.R.2d 830.

Limitation of actions, enforceability of bail bond or recognizance against surety where, at time it was filed, prosecution of principal was

barred by. 75 A.L.R.2d 1431.

Governor's authority to remit forfeited bail bond. 77 A.L.R.2d 988.

Appealability of order relating to forfeiture of bail. 78 A.L.R.2d 1180.

Burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great. 89 A.L.R.2d 355.

Propriety of applying cash bail to payment of fine. 42 A.L.R.5th 547.

Insanity of accused as affecting right to bail in criminal case. 11 A.L.R.3d 1385.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond. 18 A.L.R.3d 1354.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act. 53 A.L.R.3d 848.

Right of bail in proceeding in juvenile courts. 53 A.L.R.3d 848.

Pretrial preventive detention by state court. 75 A.L.R.3d 956.

Bail: Effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

Bail: Effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction. 35 A.L.R.4th 1192.

19-2902. Taking of bail defined. — The taking of bail consists in the acceptance by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum. [Cr. Prac. 1864, § 495; R.S., R.C., & C.L., § 8101; C.S., § 9093; I.C.A., § 19-2802.]

Cited in: In re Schuster, 25 Idaho 465, 138 P. 135 (1914).

19-2903. Capital offenses not bailable. — A defendant charged with an offense punishable with death can not be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumption to be drawn therefrom. [1875, p. 363, § 492; R.S., R.C., & C.L., § 8102; C.S., § 9094; I.C.A., § 19-2803.]

Cross ref. Constitutional provision, Const., art. 1, § 6.

Cited in: State v. Hall, 111 Idaho 327, 727 P.2d 1255 (Ct. App. 1986).

ANALYSIS

In general.
Proof evident.

In General.

A defendant was not entitled to release on bail pending appeal after arrest and conviction of murder. State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966).

Proof Evident.

Where the shooting took place in daylight before witnesses, it was apparent that the proof was evident, and the presumption great of guilt, there was no error committed in refusing to set bail. State v. Linn, 93 Idaho 430, 462 P.2d 729 (1969).

Collateral References. See collateral references, § 19-2906.

19-2904. Admittance to bail before conviction. — If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right. [1875, p. 363, § 493; R.S., R.C., & C.L., § 8103; C.S., § 9095; I.C.A., § 19-2804.]

Cross ref. Privilege of bail guaranteed, Const., art. 1, § 6.

ANALYSIS

Revocation of bail.
—After guilty plea.

Revocation of Bail.

—After Guilty Plea.

In a lewd conduct and sexual abuse of a minor case, where the judge based his decision to revoke the bail on the seriousness of the two charges, the fact that defendant first denied guilt and intent at his arraignment and then admitted the requisite intent, thereby indicating to the judge some degree of denial, and the judge's "gut feeling" that defendant might flee, based on his observations, the judge did not abuse his discretion by disallowing bail when he accepted defendant's guilty plea. State v. Sabin, 120 Idaho 780, 820 P.2d 375 (Ct. App. 1991).

19-2905. Bail pending appeal from conviction in a criminal case. — Bail may be allowed to the defendant where good cause is shown, in all cases in which the appeal is from the trial, conviction or sentence for a criminal offense; except that no bail shall be allowed when the defendant has been sentenced for the said criminal offense to death, life imprisonment or for a term of incarceration exceeding five (5) years or where there has been an enhanced penalty imposed pursuant to sections 19-2520 or 19-2520A, Idaho Code. Notwithstanding any rule of court or statutory provision to the contrary, no court of the state shall have any power to alter the right to bail pending appeal as limited herein. [I.C., § 19-2905, as added by 1980, ch. 193, § 2, p. 428; am. 1986, ch. 125, § 1, p. 326.]

Compiler's notes. Former § 19-2905 which comprised Cr. Prac. 1864, § 499; R.S., R.C., & C.L., § 8104; C.S., § 9096; I.C.A., § 19-2805, was repealed by S.L. 1980, ch. 193, § 1.

Former § 19-2520A, referred to in this section, was repealed by § 1 of S.L. 1986, ch. 319, effective February 1, 1987.

Conflict With Criminal Rules.

As to the authority of a trial court to allow post-conviction bail to a convicted criminal

made ineligible for bail by a statutory enactment, the issue is one of procedure rather than of substantive law, and where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in manners of procedure, the rules will prevail. Thus, a trial court may allow post-conviction bail under I.C.R. 46(b) to a convicted criminal who is ineligible for bail under this section. State v. Currington, 108 Idaho 539, 700 P.2d 942 (1985).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Bail on certificate of probable cause.
 Discretion of court.
 Form of bond.
 Imprisonment for misdemeanor.
 Intention to appeal.
 Presumption of guilt.
 Right to bail.

Bail on Certificate of Probable Cause.

Admission to bail after conviction is a matter entirely separate and distinct from a certificate of probable cause; while defendant may not be admitted to bail prior to the issuance of such certificate, yet, on the other hand, a certificate may and should properly issue in many cases where defendant should not be admitted to bail. *In re Neil*, 12 Idaho 749, 87 P. 881 (1906).

Issuance of certificate of probable cause does not necessarily entitle defendant to release on bail. *State v. Iverson*, 76 Idaho 117, 278 P.2d 205 (1954).

Discretion of Court.

Where defendant who has been sentenced to imprisonment appeals and applies to trial judge for admission to bail, such application is addressed to the sound legal discretion of such judge or court, and unless it clearly appears that such discretion has been abused, action of trial judge or court will not be disturbed or interfered with by Supreme Court on application for a writ of habeas corpus. *In re Schriber*, 19 Idaho 531, 114 P. 29, 37 L.R.A. (n.s.) 693 (1911).

In prosecution of bank officer for making false reports, admission to bail after conviction and pending appeal is discretionary with trial court. *State v. Waterman*, 36 Idaho 259, 210 P. 208 (1922).

A reviewing court may not set aside an order denying bail where there is no abuse of discretion apparent. *In re Bolitho*, 51 Idaho 302, 6 P.2d 855 (1931).

Discretion in giving or refusing bail should be judicially exercised. *State v. Iverson*, 76 Idaho 117, 278 P.2d 205 (1954).

Refusal of bail pending appeal of one convicted of lewd conduct with minor under 16 and sentenced for life was not an abuse of discretion though defendant desired to un-

dergo treatment for mental condition. *State v. Iverson*, 76 Idaho 117, 278 P.2d 205 (1954).

A convicted and sentenced defendant who appeals and applies to the trial court for admission to bail addresses such application to the sound legal discretion of the court and, unless it appears such discretion has been abused, action of the trial court on such application will not be disturbed on appeal. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

While an application for admission to bail is addressed to the sound discretion of the trial court and that court's decision will not be set aside absent an abuse of discretion, bail cannot be denied without some sufficient reason being articulated by the trial court. *State v. Kerrigan*, 98 Idaho 701, 571 P.2d 762 (1977).

Form of Bond.

Conditions of bail bond. *In re Schuster*, 25 Idaho 465, 138 P. 135 (1914).

Imprisonment for Misdemeanor.

Applicable to misdemeanors where incarceration is part of sentence. *In re Bolitho*, 51 Idaho 302, 6 P.2d 855 (1931).

Intention to Appeal.

A convicted defendant does not qualify for admission to bail under this section by orally advising the court of his intention to appeal. *State v. Dunn*, 91 Idaho 870, 434 P.2d 88 (1967).

Presumption of Guilt.

In an application for bail after conviction, applicant is presumed to be guilty. *In re Bolitho*, 51 Idaho 302, 6 P.2d 855 (1931).

Right to Bail.

As a general rule a defendant prosecuting an appeal in good faith should be entitled to bail. *State v. Iverson*, 76 Idaho 117, 278 P.2d 205 (1954).

Since defendant was sentenced to a ten-year indeterminate period and, under this section, would not be eligible for bail pending appeal and since it appeared that his appeal was frivolous, trial court did not abuse its discretion in denying bail pending appeal. *State v. Trefren*, 112 Idaho 812, 736 P.2d 864 (Ct. App. 1987), cert. denied, 113 Idaho 638, 747 P.2d 47 (1987).

19-2906. Nature of bail. — (1) If the offense is bailable, the defendant may be admitted to bail before conviction:

(a) For his appearance before the magistrate on the examination of the charge, before being held to answer.

(b) To appear at the court to which the magistrate is required to return the depositions upon the defendant being held to answer after examination.

(c) After indictment, either before the bench warrant is issued for his arrest or upon any order of the court committing him or enlarging the amount of bail, or upon his being surrendered by his bail to answer the indictment in the court in which it is found, or to which it may be transferred for trial.

(2) After conviction, and upon an appeal:

(a) If the appeal is from a judgment imposing a fine only, on the undertaking of bail, that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed, modified, or the appeal is dismissed.

(b) If judgment of imprisonment has been given, upon its being affirmed or modified, or upon the appeal being dismissed; or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof. [Cr. Prac. 1864, §§ 500, 501; R.S., R.C., & C.L., § 8105; C.S., § 9097; I.C.A., § 19-2806; am. 1996, ch. 424, § 1, p. 1448.]

Compiler's notes. Section 2 of S.L. 1996, ch. 424 is compiled as § 19-2909.

ANALYSIS

Appeals.

—Bondsman's liability.

Construction.

Determination of admission to bail.

New charge before magistrate.

Appeals.

The trial court's order refusing to exonerate a bail bond was an appealable order under I.A.R., Rule 11(a)(1). *State v. Rupp*, 123 Idaho 1, 843 P.2d 151 (1992).

—Bondsman's Liability.

The terms of an appellate bail bond read into the record extended bondsman's liability on the bond until defendant appeared before the trial court on remand. *State v. Rupp*, 123 Idaho 1, 843 P.2d 151 (1992).

Construction.

The statute does not require the giving of security on appeal for payment of a fine unless there is attached to fine the alternative of imprisonment in case fine is not paid. In re Schuster, 25 Idaho 465, 138 P. 135 (1914).

Determination of Admission to Bail.

On the question as to admittance to bail after conviction, the district court should consider, whether defendant is prosecuting appeal in good faith, the personal situation of defendant, the nature and circumstances of the offense, defendant's past record, the possibility that defendant will commit additional offenses, and the possibility that defendant will attempt to escape. *State v. Jimenez*, 93 Idaho 140, 456 P.2d 784 (1969).

Factors to be considered in determining whether or not a defendant should be admitted to bail are: whether the appeal is taken in good faith, whether his release would create a menace to society in light of the crime of which he was convicted and his past record and whether he is likely to flee in view of his community ties and record of appearance at past hearings. *State v. Kerrigan*, 98 Idaho 701, 571 P.2d 762 (1977).

New Charge Before Magistrate.

Where bail bond has been duly executed prior to preliminary examination to obtain release of one charged with crime, and district court upon motion to quash the information orders the case resubmitted to committing magistrate, and prosecuting attorney files a new complaint before such magistrate, the latter has no authority to call upon the sureties to produce the body of defendant to answer the new charge, or to declare the bond forfeited by reason of their failure to do so. *State v. McLeod*, 31 Idaho 536, 173 P. 496 (1918).

Collateral References. Waiver of privilege against arrest, by giving bail. 8 A.L.R. 757.

Abolition of death penalty as affecting right to bail of one charged with murder in first degree. 8 A.L.R. 1352.

Constitutional right to bail pending appeal from conviction. 19 A.L.R. 807; 77 A.L.R. 1235.

Power to admit to bail in deportation case. 36 A.L.R. 887.

Bail pending appeal from conviction. 45 A.L.R. 458.

Amount of bail required in criminal action. 53 A.L.R. 399.

Arresting one who has been released on bail. 62 A.L.R. 462.

Factors in fixing amount of bail in criminal cases. 72 A.L.R. 801.

Amount of bail as affected by forfeiture of other bonds. 72 A.L.R. 820.

Specific crime, necessity of reference to, in bail bond. 103 A.L.R. 535.

Rape asailable offense. 118 A.L.R. 1115.

Dismissal or vacation of indictment as terminating liability or obligation of surety on

bail bond. 18 A.L.R.3d 1354.

Liability on bail bond taken without authority. 27 A.L.R.4th 246.

Bail: Duration of surety's liability on pre-trial bond. 32 A.L.R.4th 504.

Bail: Duration of surety's liability on posttrial bail bond. 32 A.L.R.4th 575.

Bail: Effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial. 32 A.L.R.4th 600.

19-2907. Notice of application. — When the admission to bail is a matter of discretion, the court or officer to whom the application is made must require reasonable notice thereof to be given to the prosecuting attorney of the county. [Cr. Prac. 1864, § 498; R.S., R.C., & C.L., § 8106; C.S., § 9098; I.C.A., § 19-2807.]

19-2908. What magistrate may admit to bail. — When the defendant has been held to answer upon an examination for a public offense, the admission to bail may be by the magistrate by whom he is so held, or by any magistrate who has power to issue the writ of habeas corpus. [Cr. Prac. 1864, § 502; R.S., R.C., & C.L., § 8107; C.S., § 9099; I.C.A., § 19-2808.]

19-2909. Form of undertaking. — Bail is put in by a written undertaking executed by two (2) sufficient sureties (with or without the defendant, in the discretion of the magistrate), and acknowledged before the court or magistrate, in substantially the following form:

An order having been made on the day of, by A.B., a judge of.....county (or as the case may be), that C.D. be held to answer upon a charge of (stating briefly the nature of the offense), upon which he has been admitted to bail in the sum of dollars; we, E.F. and G.H. (stating their place of residence), hereby undertake that the above named C.D. will appear and answer the charge abovementioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for pronouncement of judgment, or if he fails to perform any of these conditions, that we will pay to the people of the state of Idaho the sum set forth above. [Cr. Prac. 1864, § 503; R.S., R.C., & C.L., § 8108; C.S., § 9100; I.C.A., § 19-2809; am. 1996, ch. 424, § 2, p. 1448; am. 2002, ch. 32, § 5, p. 36.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Sections 1 and 3 of S.L. 1996, ch. 424 are compiled as §§ 19-2906 and 19-2916, respectively.

Sections 4 and 6 of S.L. 2002, ch. 32 are compiled as §§ 19-1506 and 19-3006, respectively.

Cross ref. Surety bonds, § 41-2607.

ANALYSIS

Defective bonds.

Justification before notary.

Defective Bonds.

Bond payable to "the people of the United States" instead of to "the people of the United States in the territory of Idaho" must be reformed before any judgment can be rendered upon it in favor of the people of the

territory. *United States v. Shoup*, 2 Idaho (Hasb.) 493, 21 P. 656 (1889).

Justification Before Notary.

This section does not prohibit justification of sureties before a notary public if committing magistrate is willing to approve bond after it is so acknowledged; the bond is valid and enforceable against sureties, notwithstanding its acknowledgment before a notary. *State v. Baird*, 13 Idaho 126, 89 P. 298 (1907).

Collateral References. Variance between name in bail bond and in judgment of forfeiture. 20 A.L.R. 411.

Acknowledgment of bail bond in open court, necessity of. 38 A.L.R. 1108.

Promise by one other than principal to indemnify one agreeing to become surety or guarantor as within statute of frauds. 13 A.L.R.4th 1153.

19-2910. Qualifications of bail. — The qualifications of bail are as follows:

1. Each of them must be a resident, householder or freeholder within the state; but the court or magistrate may refuse to accept any person as bail who is not a resident of the county where bail is offered.

2. They must each be worth the amount specified in the undertaking, exclusive of property exempt from execution; but the court or magistrate, on taking bail, may allow more than two (2) sureties to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to that of sufficient bail. [Cr. Prac. 1864, § 504; R.S., R.C., & C.L., § 8109; C.S., § 9101; I.C.A., § 19-2810.]

Collateral References. Necessity of acknowledgment of bail bond in open court. 38 A.L.R. 1108.

Lien or encumbrance on his real property as affecting qualifications of surety on bail bond. 56 A.L.R. 1097.

Disciplinary power of court in respect of suretyship in judicial proceedings. 91 A.L.R. 889.

19-2911. Justification of bail. — The bail must in all cases justify by affidavit taken before the magistrate, that they each possess the qualifications provided in the preceding section. The magistrate may further examine the bail upon oath concerning their sufficiency, in such manner as he may deem proper. [Cr. Prac. 1864, §§ 505, 506; R.S., R.C., & C.L., § 8110; C.S., § 9102; I.C.A., § 19-2811.]

19-2912. Discharge of defendant on giving bail. — Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged. [R.S., R.C., & C.L., § 8111; C.S., § 9103; I.C.A., § 19-2812.]

19-2913. Defendant to be taken before magistrate on arrest. — When the offense charged in the indictment is not punishable with death, the officer serving the bench warrant must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. [1875, p. 363, § 503; R.S., R.C., & C.L., § 8112; C.S., § 9104; I.C.A., § 19-2813.]

19-2914. Arrest of defendant for capital offense. — If the offense charged in the indictment is punishable with death, the officer arresting the

defendant must deliver him into custody, according to the command of the bench warrant. [Cr. Prac. 1864, § 508; R.S., R.C., & C.L., § 8113; C.S., § 9105; I.C.A., § 19-2814.]

19-2915. Bail on habeas corpus. — When the defendant is so delivered into custody, he must be held by the sheriff, unless admitted to bail on examination upon a writ of habeas corpus. [Cr. Prac. 1864, § 509; R.S., R.C., & C.L., § 8114; C.S., § 9106; I.C.A., § 19-2815.]

19-2916. Undertaking after indictment — Form. — The bail must be put in by a written undertaking, executed by two (2) sufficient sureties (with or without the defendant, in the discretion of the court), and acknowledged before the court, in substantially the following form:

An indictment having been found on day of, 19.., in the district court of the county of, charging A.B. with the crime of (designating it generally), and he having been admitted to bail in the sum of dollars, we, C.D. and E.T., of (stating their place of residence), hereby undertake that the above named A.B. will appear and answer the indictment above mentioned, in whatever court it may be prosecuted, and will at all times render himself amenable to the orders and process of the court, and if convicted, will appear for pronouncement of judgment; or, if he fails to perform any of these conditions, that we will pay to the people of the state of Idaho the sum set forth above. [Cr. Prac. 1864, § 510; R.S., R.C., & C.L., § 8115; C.S., § 9107; I.C.A., § 19-2816; am. 1996, ch. 424, § 3, p. 1448.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Sections 2 and 4 of S.L. 1996, ch. 424 are

compiled as §§ 19-2909 and 19-2918, respectively.

Cross ref. Surety bonds, § 41-2607.

19-2917. Bail after indictment — Application of other sections. — The provisions contained in this chapter in relation to bail before indictment, apply to the qualifications of the bail, and to all the proceedings respecting the putting in and justifying of bail and incident thereto. [Cr. Prac. 1864, § 511; R.S., R.C., & C.L., § 8116; C.S., § 9108; I.C.A., § 19-2817.]

19-2918. Increase or reduction of bail. — After a defendant has been admitted to bail, the court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail. If the amount be increased, the court shall order the defendant to be committed to actual custody, unless he give bail in such increased amount. If application be made by the defendant for a reduction of the amount, notice of the application must be served upon the prosecuting attorney. [R.S., R.C., & C.L., § 8117; C.S., § 9109; I.C.A., § 19-2818; am. 1996, ch. 424, § 4, p. 1448.]

Compiler's notes. Sections 3 and 5 of S.L. 1996, ch. 424 are compiled as §§ 19-2916 and 19-2924, respectively.

19-2919. Bail on appeal — Who may admit to. — In cases in which defendant may be admitted to bail upon an appeal, the order admitting him to bail may be made by any magistrate having the power to issue a writ of habeas corpus, or by the magistrate before whom the trial was had. [Cr. Prac. 1864, § 512; R.S., R.C., & C.L., § 8118; C.S., § 9110; I.C.A., § 19-2819.]

19-2920. Bail on appeal — Qualifications and how put in — Undertaking. — The bail must possess the qualifications, and must be put in in all respects as provided in this chapter, except that the undertaking must be conditioned as prescribed for undertakings of bail on appeal. [Cr. Prac. 1864, § 514; R.S., R.C., & C.L., § 8119; C.S., § 9111; I.C.A., § 19-2820.]

19-2921. Deposit in lieu of bail. — The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the court in which he is held to answer the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate of the deposit, he must be discharged from custody. [Cr. Prac. 1864, § 515; R.S., R.C., & C.L., § 8120; C.S., § 9112; I.C.A., § 19-2821.]

19-2922. Deposit after bail. — If the defendant has given bail, he may at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the recognizance, and upon the deposit being made, the bail is exonerated. [Cr. Prac. 1864, § 516; R.S., R.C., & C.L., § 8121; C.S., § 9113; I.C.A., § 19-2822.]

19-2923. Deposit applied to payment of fines, fees and costs. — When the money has been deposited, if it remains on deposit at the time of the judgment, the clerk must, under the direction of the court, apply the money in satisfaction of fines, fees and costs imposed in the case and fines, fees and costs which have been imposed against the defendant in any other criminal action, and after satisfying the fines, fees and costs, must refund the surplus, if any, to the party posting the deposit. [Cr. Prac. 1864, § 517; R.S., R.C., & C.L., § 8122; C.S., § 9114; I.C.A., § 19-2823; am. 1995, ch. 158, § 1, p. 636; am. 2000, ch. 328, § 1, p. 1105.]

Compiler's notes. Section 2 of S.L. 1995, amending A.L.R. 5th 547, relating to pledging cash bail to payment of fine, 42 ch. 158 is compiled as § 19-2926.

Collateral References. Propriety of ap-

19-2924. Surrender of defendant by bail. — At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer in whose custody he was committed at the time of giving bail, or to the county sheriff where the action is pending, in the following manner:

1. A certificate of surrender, executed by the bail, must be delivered to the officer, who must also attach thereto his signature, the month, day, year and time of day as evidence of surrender and detain the defendant in his custody

thereon as upon a commitment. The certificate of surrender shall contain the legal caption of the action in which the undertaking was given, including the name of the defendant, case number, name and address of the bail, and shall clearly state that the bond is being revoked by the bail.

2. The bail or bail bondsman shall, the next judicial day, file with the court in which the action or appeal is pending the certificate of surrender, and shall deliver a copy of the same to the county prosecuting attorney. The court shall thereupon order that the bail be exonerated. [Cr. Prac. 1864, §§ 518, 519; R.S., R.C., & C.L., § 8123; C.S., § 9115; I.C.A., § 19-2824; am. 1996, ch. 424, § 5, p. 1448; am. 2004, ch. 251, § 1, p. 723.]

Compiler's notes. Sections 4 and 6 of S.L. 1996, ch. 424 are compiled as §§ 19-2918 and 19-2926, respectively.

Sec. to sec. ref. This section is referred to in § 19-2926.

In General.

This section refers only to the surrender of

the defendant before forfeiture of the bond and is not available to the surety after forfeiture has been entered. *State v. Overby*, 90 Idaho 41, 408 P.2d 155 (1965).

19-2925. Arrest of defendant for surrender. — For the purpose of surrendering the defendant, the bail, at any time before they are finally discharged, and at any place within the state, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. [Cr. Prac. 1864, § 520; R.S., R.C., & C.L., § 8124; C.S., § 9116; I.C.A., § 19-2825.]

Sec. to sec. ref. This section is referred to in § 19-2926.

In General.

This section refers only to the arrest of the defendant for surrender before forfeiture and a surety who procured the arrest of the defendant after forfeiture of the bond had been entered was not entitled to exoneration as provided in § 19-2924. *State v. Overby*, 90 Idaho 41, 408 P.2d 155 (1965).

Collateral References. See collateral references under § 19-2906.

Surrender of principal by sureties on bail bond. 3 A.L.R. 180; 15 A.L.R. 1524; 32 A.L.R. 259; 43 A.L.R. 140; 73 A.L.R. 1369.

Passing an indictment to the files as discharging bail. 18 A.L.R. 1154.

Bail: Effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

19-2926. Return of deposit on surrender. — If money has been deposited instead of bail, and the defendant at any time before the forfeiture thereof surrenders himself to the officer to whom the commitment was directed in the manner provided in the last two (2) sections, the court must order a return of the deposit to the party posting the deposit, upon producing the certificate of the officer showing the surrender. A copy of the court's order shall be delivered to the prosecuting attorney. [Cr. Prac. 1864, § 521; R.S., R.C., & C.L., § 8125; C.S., § 9117; I.C.A., § 19-2826; am. 1995, ch. 158, § 2, p. 636; am. 1996, ch. 424, § 6, p. 1448.]

Compiler's notes. Section 1 of S.L. 1995, ch. 158 is compiled as § 19-2923.

Section 5 of S.L. 1996, ch. 424 is compiled as § 19-2924.

Collateral References. Right to recover back cash bail taken without authority. 26 A.L.R. 211; 44 A.L.R. 1499; 48 A.L.R. 1430.

19-2927. Forfeiture of bail. — If, without sufficient excuse, the defendant neglects to appear before the court upon any occasion when his presence has been ordered the court must immediately direct the fact to be entered upon its minutes, order the forfeiture of the undertaking of bail, or the money deposited instead of bail, as the case may be, and order the issuance of a bench warrant for the arrest of the defendant. The clerk shall mail written notice within five (5) days of the forfeiture for failure to appear to the last known address of the person posting the undertaking of bail. A failure to give timely notice shall exonerate the bail or undertaking. If at any time within ninety (90) days after such entry in the minutes, the defendant appears and satisfactorily excuses his neglect, the court shall direct the forfeiture of the undertaking or the deposit to be exonerated.

If within ninety (90) days of the date of forfeiture, a person, other than the defendant, who has provided bail for the defendant, surrenders the defendant to any Idaho peace officer, the undertaking of bail or deposits are thereby exonerated.

The court which has forfeited the undertaking of bail, or the money deposited instead of bail, may, before remittance of the forfeiture, and with the written consent of the person posting the same, set aside the forfeiture and reinstate the undertaking of bail or money deposited instead of bail. [Cr. Prac. 1864, §§ 522, 523; R.S., R.C., & C.L., § 8126; C.S., § 9118; am. 1929, ch. 234, § 1, p. 456; I.C.A., § 19-2827; am. 1976, ch. 137, § 1, p. 511; am. 1990, ch. 73, § 1, p. 156; am. 1996, ch. 424, § 7, p. 1448.]

Compiler's notes. Section 8 of S.L. 1996, ch. 424 is compiled as § 19-2936.

ANALYSIS

- Appeals.
- Continuance.
- Discretion of court.
- Escape.
- Execution for fine.
- Factors considered.
- Factual findings not required.
- In general.
- Time for relief.

Appeals.

In appeal from conviction for burglary the defendant could not contend that action of trial court in ordering forfeiture of bond for failure of defendant to appear on date set for trial was error, since defendant should have appealed from the order forfeiting the bond, as the order forfeiting the bond was a final appealable order. State v. Fedder, 76 Idaho 535, 285 P.2d 802 (1956).

The issue of whether the district court met its statutory duties prior to forfeiting defendants' bail is a question of statutory construction over which the Court of Appeals exercises free review. State v. Plant, 130 Idaho 130, 937 P.2d 442 (Ct. App. 1997).

Continuance.

Magistrate's continuance of case for arraignment without forfeiting defendant's

bond for failure to appear did not affect the district court's power to later forfeit missing defendant's bond. State v. Rocha, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Discretion of Court.

While it has long been held in Idaho that matters such as the fixing of bail and the release from custody are within the discretion of the court, the forfeiture of a bond or the setting aside of such a forfeiture are also discretionary decisions within the realm of the district court. State v. Fry, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

Where a defendant failed to appear before the court because he was incarcerated in another jurisdiction and where the district court held that his incarceration did not amount to a sufficient excuse and that this issue was not one of discretion, the court erred by failing to recognize that the issue of bond forfeiture was one to which discretion should be applied. State v. Fry, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

Magistrate did not abuse its discretion in failing to forfeit defendant's bond when he failed to appear at a preliminary hearing, where the magistrate had a reasonable belief, later proven incorrect, that the defendant's failure to appear was excusable. State v. Rocha, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Escape.

Person committed to jail must be confined therein until he is discharged; if he is permitted to go at large out of jail except by virtue of legal order or process, it is an escape. *Cornell v. Mason*, 46 Idaho 112, 268 P. 8 (1928).

Execution for Fine.

Where judgment is for fine and costs, an execution may issue thereon as in judgment in a civil case. *In re Schuster*, 25 Idaho 465, 138 P. 135 (1914).

Factors Considered.

In deciding how much, if any, of the bond to forfeit, when defendant fails to appear before the court, the court should also consider: (1) the willfulness of the defendant's violation of bail conditions; (2) the surety's participation in locating and apprehending the defendant; (3) the costs, inconvenience, and prejudice suffered by the state as a result of the violation; (4) any intangible costs; (5) the public's interest in ensuring a defendant's appearance; and (6) any mitigating factors. *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

The incarceration of a defendant in another jurisdiction, which prevented him from appearing before the court, is only one factor to be considered by the district court in making its discretionary decision whether to forfeit the bond; the court should also consider whether the incarceration arises from a new crime committed while the defendant was free on bond or from an offense that preceded his arrest. *State v. Fry*, 128 Idaho 50, 910 P.2d 164 (Ct. App. 1994).

Factual Findings not Required.

The district court's findings that the defendants failed to appear when ordered was sufficient to satisfy this section; the district court was not required to make factual findings regarding the defendants' excuses for

failing to appear. *State v. Plant*, 130 Idaho 130, 937 P.2d 442 (Ct. App. 1997).

In General.

The right to relief from forfeiture of bail or deposit in lieu thereof is governed by statute. *State v. Mayer*, 81 Idaho 111, 338 P.2d 270 (1959).

Time for Relief.

The only ground on which relief may be granted after forfeiture is the excusable neglect of the defendant for failure to appear and, where the defendant, subsequent to forfeiture of his bond followed by his arrest, told the court that he was in town on the day he was required to appear but did not appear, relief from the forfeiture cannot be granted. *State v. Overby*, 90 Idaho 41, 408 P.2d 155 (1968).

Collateral References. Amount of bail as affected by forfeiture of other bonds. 72 A.L.R. 820.

Insanity of principal as relieving bail for his nonappearance. 7 A.L.R. 394.

Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8 A.L.R. 371; 147 A.L.R. 1428; 151 A.L.R. 1462; 153 A.L.R. 1431.

Escape of principal during his detention on separate charge as affecting liability of bail. 45 A.L.R. 1037.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal. 84 A.L.R. 420.

Arraignment and plea, failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite. 90 A.L.R. 298.

Liability of surety on bail bond taken without authority. 27 A.L.R.4th 246.

Bail: Effect on surety's liability under bail bond of principal's incarceration in other jurisdiction. 33 A.L.R.4th 663.

19-2928. Enforcement of forfeiture. — If the forfeiture is not discharged, as provided in the last section, the prosecuting attorney may, at any time after ninety (90) days from the entry upon the minutes, as provided in the last section, proceed by action in the name of the county, against the bail upon their undertaking. [Cr. Prac. 1864, § 524; R.S., R.C., & C.L., § 8127; C.S., § 9119; am. 1929, ch. 234, § 2, p. 456; I.C.A., § 19-2828; am. 1990, ch. 73, § 2, p. 156.]

Cited in: *Bonneville County v. United Bonding Ins. Co.*, 90 Idaho 39, 408 P.2d 158 (1965).

ANALYSIS

Appeals.

Execution for fine and costs.

In general.

Requirements.

Appeals.

In appeal from conviction for burglary the defendant could not contend that action of trial court in ordering forfeiture on bond for failure of defendant to appear on date set for trial was error, since defendant should have appealed from the order forfeiting the bond,

as the order forfeiting the bond was a final appealable order. *State v. Fedder*, 76 Idaho 535, 285 P.2d 802 (1955).

Execution for Fine and Costs.

If the judgment is for fine and costs, an execution may be issued thereon as in case of judgment in civil case. In *re Schuster*, 25 Idaho 465, 138 P. 135 (1914).

In General.

This section authorizes the state to enforce a criminal bond forfeiture through a separate civil action. *State v. Rocha*, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Requirements.

There is no provision in the state code or

criminal rules authorizing the enforcement of a bail bond forfeiture without the necessity of an independent action. *State v. Rocha*, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Once proper notice is given and a surety fails to remit the forfeited bail bond, the prosecuting attorney may proceed under this section for enforcement of the forfeited bond. *State v. Rocha*, 131 Idaho 113, 952 P.2d 1249 (Ct. App. 1998).

Collateral References. Variance between name in bail bond and in judgment of forfeiture. 20 A.L.R. 411.

19-2929. Forfeiture of deposit. — If, by reason of the neglect of the defendant to appear, money deposited instead of bail is forfeited, the clerk shall mail written notice within five (5) days to the last known address of the person posting the money of the forfeiture for failure to appear. A failure to give timely notice shall exonerate the bail. If the forfeiture is not discharged or remitted, the clerk with whom it is deposited must, at the end of ninety (90) days, of the date of forfeiture, unless the court has before that time discharged the forfeiture, pay over the money deposited to the county treasurer. [Cr. Prac. 1864, § 525; R.S., R.C., & C.L., § 8128; C.S., § 9120; am. 1929, ch. 234, § 3, p. 456; I.C.A., § 19-2829; am. 1990, ch. 72, § 1, p. 156.]

Cross ref. Forfeitures remitted to county auditor, § 19-4705.

deposit in lieu thereof is governed by statute. *State v. Mayer*, 81 Idaho 111, 338 P.2d 270 (1959).

In General.

The right to relief from forfeiture of bail or

19-2930. Recommitment of defendant after bail. — The court to which the committing magistrate returns the depositions, or in which an indictment or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged in the following cases:

1. When, by reason of his failure to appear, he has incurred a forfeiture of his bail, or of money deposited instead thereof.
2. When it satisfactorily appears to the court that his bail, or either of them, are dead or insufficient, or have removed from the state.
3. Upon an indictment being found in the cases provided in section 19-1510. [Cr. Prac. 1864, § 526; R.S., R.C., & C.L., § 8129; C.S., § 9121; I.C.A., § 19-2830.]

19-2931. Order for recommitment. — The order for the recommitment of the defendant must recite generally the facts upon which it is

founded, and direct that the defendant be arrested by any sheriff, constable, marshal, or policeman in this state, and committed to the officer in whose custody he was at the time he was admitted to bail, to be detained until legally discharged. [Cr. Prac. 1864, § 527; R.S., R.C., & C.L., § 8130; C.S., § 9122; I.C.A., § 19-2831.]

19-2932. Arrest for recommitment. — The defendant may be arrested pursuant to the order, upon a certified copy thereof, in any county in the same manner as upon a warrant of arrest, except that when arrested in another county the order need not be endorsed by a magistrate of that county. [Cr. Prac. 1864, § 528; R.S., R.C., & C.L., § 8131; C.S., § 9123; I.C.A., § 19-2832.]

19-2933. Commitment to await judgment. — If the order recites, as the ground upon which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order. [Cr. Prac. 1864, § 529; R.S., R.C., & C.L., § 8132; C.S., § 9124; I.C.A., § 19-2833.]

19-2934. Readmittance to bail. — If the order be made for any other cause, and the offense is bailable, the court may fix the amount of bail, and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order. [Cr. Prac. 1864, § 530; R.S., R.C., & C.L., § 8133; C.S., § 9125; I.C.A., § 19-2834.]

19-2935. Who may take bail upon readmittance. — When the defendant is admitted to bail, the bail may be taken by any magistrate in the county, having authority in a similar case to admit to bail, upon the holding of the defendant to answer before an indictment, or by any other magistrate designated by the court. [Cr. Prac. 1864, § 531; R.S., R.C., & C.L., § 8134; C.S., § 9126; I.C.A., § 19-2835.]

19-2936. Bail on recommitment — Form of undertaking. — When bail is taken upon the recommitment of the defendant, the undertaking must be in substantially the following form:

An order having been made on the day of, 19.., by the court (naming it), that A.B. be admitted to bail in the sum of dollars in an action pending in that court against him in behalf of the state of Idaho, upon an (information, presentment, indictment, or appeal, as the case may be), we, C.D. and E.F., of (stating their places of residence), hereby undertake that the above named A.B. will appear in that or any other court in which his appearance may be lawfully required upon that (information, presentment, indictment, or appeal, as the case may be), and will at all times render himself amenable to its orders and process and appear for pronouncement of judgment; or if he fails to perform any of these conditions, that we will pay to the state of Idaho the sum set forth above. [Cr. Prac. 1864, § 532; R.S., R.C., & C.L., § 8135; C.S., § 9127; I.C.A., § 19-2836; am. 1996, ch. 424, § 8, p. 1448.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 7 of S.L. 1996, ch. 424 is compiled as § 19-2927.

19-2937. Bail on recommitment — Qualifications and how put in. — The bail must possess the qualifications and must be put in, in all respects in the manner prescribed in this chapter. [Cr. Prac. 1864, § 533; R.S., R.C., & C.L., § 8136; C.S., § 9128; I.C.A., § 19-2837.]

CHAPTER 30

WITNESSES IN CRIMINAL PROCEEDINGS

SECTION.

- 19-3001. Rules for determining competency.
- 19-3002. Husband and wife as witnesses.
- 19-3003. Defendant not obliged to testify.
- 19-3004. Compelling attendance of witness — Subpoena and how issued.
- 19-3005. Uniform act to secure attendance of witnesses.
- 19-3006. Form of subpoena.
- 19-3007. Service of subpoena.
- 19-3007A. Service of subpoena by mail or messenger.
- 19-3008. Fees and mileage of witnesses.
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- 19-3012. Production of imprisoned witness — Procedure.

SECTION.

- 19-3013. Definitions.
- 19-3014. Summoning witness in this state to testify in another state.
- 19-3015. Court order.
- 19-3016. Terms and conditions.
- 19-3017. Exceptions.
- 19-3018. Prisoner from another state summoned to testify in this state.
- 19-3019. Compliance.
- 19-3020. Exemption from arrest and service of process.
- 19-3021. Uniformity of interpretation.
- 19-3022. Short title.
- 19-3023. Child summoned as witness.
- 19-3024. Statements by child.
- 19-3024A. [Repealed.]
- 19-3025. Witness psychiatric, psychological examination.

19-3001. Rules for determining competency. — The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code. [R.S., R.C., & C.L., § 8141; C.S., § 9129; I.C.A., § 19-2901.]

Cross ref. Bail for witnesses, I.C.R. 46.1. Competency of witnesses in civil actions, §§ 9-201 — 9-205.

Cited in: State v. Larkins, 5 Idaho 200, 47 P. 945 (1897); State v. Wilson, 93 Idaho 194, 457 P.2d 433 (1969).

ANALYSIS

Competency of interpreter.
Impeachment.
Impeachment of accused.
In general.
Testimony of accused.

Competency of Interpreter.

Where dying declarations are made through an interpreter, the fact that interpreter uses opium is admissible as affecting his credibility and ability to interpret correctly and to remember and translate the statements made in connection therewith.

State v. Fong Loon, 29 Idaho 248, 158 P. 233, L.R.A. 1916F, 1198 (1916).

Impeachment.

Statutory right to ask a witness for the purpose of impeachment if he has been convicted of a felony is not limited to civil cases, but also applies to criminal cases, since it is provided by statute that all rules of evidence applicable to civil cases are also applicable to criminal action, and it is further provided by statute that rules for determining competency of witnesses in civil cases are also applicable to criminal action, making it clear that legislature intended that a witness in a criminal action might be impeached by showing that he had committed a felony. State v. Kleier, 69 Idaho 491, 210 P.2d 388 (1948).

Impeachment of Accused.

When an accused in a criminal action voluntarily takes the witness stand, he subjects

himself to cross-examination and impeachment under the same rules and conditions as any other witness. *State v. Storms*, 84 Idaho 372, 372 P.2d 748 (1962).

In General.

By reason of the limitation of this section, only those rules for determining the competency of witnesses in civil actions that are not in conflict with the sections of the Idaho Code dealing with criminal procedure would govern a criminal proceeding. *State v. McGonigal*, 89 Idaho 177, 403 P.2d 745 (1965).

A burglary defendant who had testified that he was a chronic alcoholic and taking pathibamate pills for ulcers and, that, as a result of his drinking and the effect of such medication, he had no recollection of anything between a time several hours prior to being found in the store entered and a time several hours later was not competent to answer a question by his counsel as to his intent in entering the store. *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

Testimony of Accused.

The legislature intended that a witness might be impeached in a criminal action as in a civil action; the defendant in a criminal action, as a party to the action, need not testify at all and if he deems it prudent to remain silent, no presumption is to be indulged against him; however, when he voluntarily assumes the character of a witness he exposes himself to the legitimate attacks which may be made upon any witness. *State v. Storms*, 84 Idaho 372, 372 P.2d 748 (1962).

Collateral References. 81 Am. Jur. 2d, Witnesses, §§ 1 et seq.

98 C.J.S., Witnesses, §§ 1 et seq.

Subrogation, admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified in circumstances creating right to. 128 A.L.R. 1110.

Testing qualifications of witness to testify as to genuineness of handwriting by cross-examining him as to the genuineness of other handwriting not the subject of his direct examination. 128 A.L.R. 1939.

Admissibility, in support of general credibility of an accomplice witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant nor of probative value as against defendant. 138 A.L.R. 1266.

Prior consistent statements of witness, admissibility, purposes. 140 A.L.R. 21; 75 A.L.R.2d 909; 58 A.L.R.4th 985; 59 A.L.R.4th 1000; 47 A.L.R. Fed. 639.

Conviction upon plea of *nolo contendere* as admissible for purpose of impeaching witness. 146 A.L.R. 867.

Waiver, by witness' disclosure of fact or transaction, of his privilege against self-in-

crimination in respect to details and particulars which will elucidate it. 147 A.L.R. 255.

Admissibility, on cross-examination or otherwise, of evidence that witness in civil action had been under arrest, indictment, or other criminal accusation on a charge growing out of the accident, transaction, or occurrence involved in the civil action. 149 A.L.R. 935.

Dying declarations, weight and value of, as evidence. 167 A.L.R. 147.

Arrest, accusation, or prosecution, impeachment of witness by evidence or inquiry as to. 20 A.L.R.2d 1421.

Inferences arising from refusal to witness other than accused to answer question on the ground that answer would tend to incriminate him. 24 A.L.R.2d 895.

Impeaching defendant as witness by fingerprint evidence. 28 A.L.R.2d 1132; 45 A.L.R.4th 1178.

Impeaching defendant as witness by fingerprint evidence. 28 A.L.R.2d 1132; 45 A.L.R.4th 1178.

Cross-examination of witness in criminal case as to whether, and with whom, he has talked or discussed the facts of the case. 35 A.L.R.2d 1045.

Sufficiency of witness' claim of privilege against self-incrimination. 51 A.L.R.2d 1178.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying. 62 A.L.R.2d 610.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime. 74 A.L.R.2d 592.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like. 75 A.L.R.2d 762.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel. 88 A.L.R.2d 796.

Impeachment of accused as witness by use of involuntary or not properly qualified confession. 89 A.L.R.2d 478.

Evidence secured by mechanical or electronic eavesdropping device as admissible against witness for purpose of impeachment or showing of prior inconsistent statement. 97 A.L.R.2d 1283, 1295; 57 A.L.R.3d 172.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial. 3 A.L.R.3d 965.

Limiting number of noncharacter witnesses in criminal case. 5 A.L.R.3d 238.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 A.L.R.3d 181.

Impeachment of witness with respect to intoxication. 8 A.L.R.3d 749.

Accused's right to interview witness held in

public custody. 14 A.L.R.3d 652.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial. 16 A.L.R.3d 726.

Propriety and prejudicial effect of trial court's limiting number of character or reputation witnesses. 17 A.L.R.3d 327.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 A.L.R.3d 385.

"Fruit of the Poisonous Tree" doctrine excluding evidence derived from information gained in illegal search. 43 A.L.R.3d 385.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility. 44 A.L.R.3d 1203.

Defense attorney as witness for his client in criminal case. 52 A.L.R.3d 887.

Competency of prosecuting attorney as witness. 54 A.L.R.3d 100.

Prosecuting attorney as a witness in criminal case. 54 A.L.R.3d 100.

Use of drugs as affecting competency or credibility of witness. 65 A.L.R.3d 705.

Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it. 76 A.L.R.3d 539.

Right to cross-examine witness as to his place of residence. 85 A.L.R.3d 541.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction. 98 A.L.R.3d 1060.

Cross-examination of character witness for accused with reference to particular acts or crimes — Modern state rules. 13 A.L.R.4th 796.

Court's witnesses (other than expert) in criminal prosecution. 16 A.L.R.4th 352.

Propriety and prejudicial effect of prosecution's calling as witness to extract claim of self-incrimination privilege, one involved in offense charged against accused. 19 A.L.R.4th 368.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment of sentence thereon. 28 A.L.R.4th 647.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 A.L.R.4th 310.

Admissibility of barefoot evidence. 45 A.L.R.4th 1178.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 A.L.R.4th 705.

19-3002. Husband and wife as witnesses. — Neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties, except:

1. With the consent of both, or
2. In cases of criminal violence upon one by the other; or acts of physical injury upon a child of either the husband or the wife where the injury has been caused as a result of physical abuse or neglect by one or both of the parents; or to acts or attempted acts of lewd conduct with a minor child; or
3. In cases of desertion or nonsupport of wife or child by the husband. [R.S. & R.C., § 8142; compiled and reen. C.L., § 8142; C.S., § 9130; I.C.A., § 19-2902; am. 1979, ch. 152, § 1, p. 467.]

Cross ref. Desertion and nonsupport proceedings, rule as to confidential communications inapplicable, § 18-405.

Similar provisions, § 9-203.

Cited in: *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993 (1928); *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960); *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986); *State v. Durst*, 124 Idaho 140, 879 P.2d 603 (Ct. App. 1994).

ANALYSIS

Crime against children.

Criminal violence against spouse.

Existence of marital relation.

Precedence of i.r.e. 601.

Presentence report.

Res gestae.

Threats and acts of violence.

Crime Against Children.

The amendment of § 9-203 to permit testimony by husband and wife against each other in cases "of physical injury to a child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents" did not amend this section by implication so as to permit a wife to testify against her husband in a prosecution for lewd conduct with a minor female. *State v. McGonigal*, 89 Idaho 177, 403 P.2d 745 (1965).

Criminal Violence Against Spouse.

The clear expressed intent of the legislature must be given effect in the permitting of a

wife to testify against her husband in cases of criminal violence upon one by the other and there is no occasion to construe this to mean that a serious wrong against the minor child of a wife is a crime against the wife sufficient to remove her disqualification as a witness. *State v. Riley*, 83 Idaho 346, 362 P.2d 1075 (1960).

Existence of Marital Relation.

Where objection was made to testimony of witness on ground witness was common law wife of defendant on trial for commission of lewd acts upon the 10-year-old child of such witness, before permitting such witness to testify regarding material facts, a determination should have been made as to the existence or nonexistence of such relation. *State v. Riley*, 83 Idaho 346, 362 P.2d 1075 (1960).

Where testimony established that prior to trial, but after the alleged events material to the charged crime had taken place, the marriage between the witness and defendant was terminated by annulment, that is, at the time the witness testified, the two were not husband and wife, this section was not applicable. *State v. McKenney*, 101 Idaho 149, 609 P.2d 1140 (1980).

Precedence of I.R.E. 601.

Rule 601 of the Idaho Rules of Evidence repealed this section. Competency is an evidentiary matter over which the Supreme Court of Idaho exercises control under the Rules of Evidence; thus Rule 601 of the Idaho Rules of Evidence clearly takes precedence over this section by virtue of Idaho Rule of Evidence 1102. *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994).

The spousal incompetency provision of this section was ineffective when defendant originally pleaded guilty and, having been repealed by the Supreme Court decision of *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994), would not have prevented the State's use of the spouse-witnesses' testimony or other evidence. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Presentence Report.

Where spouses were separated at time of rape prosecution and the wife voluntarily (without subpoena) made a statement to the presentence investigator which disclosed the existence of a prior crime similar to the offense for which the husband was being sentenced, the public policy underlying the marital privilege was attenuated under such circumstances and was overridden by the policy of providing sentencing judges with the fullest possible information concerning the defendant's life and characteristics, consequently, the court did not abuse its discretion

in considering, at sentencing, the information contained in the report. *State v. Emehiser*, 106 Idaho 203, 677 P.2d 516 (Ct. App. 1984).

Res Gestae.

It is not violation of this section to introduce into evidence statements of husband or wife which are part of *res gestae*. *State v. Breyer*, 40 Idaho 324, 232 P. 560 (1924).

This statute creates only a testimonial privilege and does not affect the admissibility of nontestimonial statements otherwise admissible which were made by the spouse of a criminal defendant. *McClellan v. State*, 100 Idaho 682, 603 P.2d 1016 (1979).

Threats and Acts of Violence.

The sentencing court in rape case could properly consider wife's statements, contained in presentence report, regarding threats and acts of violence by defendant husband toward her and their son; further, statement concerning the deteriorating state of the marriage was so closely related to the statements about threats and violence that it was also properly considered. *State v. Emehiser*, 106 Idaho 203, 677 P.2d 516 (Ct. App. 1984).

Collateral References. 81 Am. Jur. 2d, Witnesses, §§ 442-444, 453, 463, 511, 530, 531, 541-547, 552-623.

98 C.J.S., Witnesses, §§ 100 — 104, 172.

Overhearing or seeing by third person of communication between husband and wife, effect of. 63 A.L.R. 107.

Expression of willingness by witness that another should testify as waiver of privilege in respect to latter's testimony. 72 A.L.R. 148.

Competency of privilege of one spouse as witness in prosecution against other for offense committed before marriage. 76 A.L.R. 1088.

Waiver of objection at one trial as affecting right to make objection at subsequent trial of same case. 79 A.L.R. 173.

Change without the aid of a statute expressly abrogating it, of rule rendering husband or wife not competent as a witness in favor of the other spouse in a criminal case. 93 A.L.R. 1144.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct. 76 A.L.R.2d 920.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases. 74 A.L.R.4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction. 74 A.L.R.4th 277.

19-3003. Defendant not obliged to testify. — A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding. [Cr. Prac. 1864, § 12; R.S., R.C., & C.L., § 8143; C.S., § 9131; I.C.A., § 19-2903.]

Cited in: State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

ANALYSIS

Applicability.
Codefendants.
Cross-examination.
Impeachment.
Instructions.
Preliminary hearing.
Sentencing hearing.

Applicability.

This section does not protect a defendant only from giving testimony that might be used against him in a subsequent prosecution; it protects him from having either his own testimony or his refusal to testify used against him in the same proceeding in which the testimony is sought. State v. Anderson, 130 Idaho 765, 947 P.2d 1013 (Ct. App. 1997).

Codefendants.

Where one of a number of codefendants has pleaded guilty, court may require him to testify either for or against his codefendants on their trial. State v. Knudtson, 11 Idaho 524, 83 P. 226 (1905).

Whether defendants were tried separately or together neither could compel another to testify. State v. Fox, 52 Idaho 474, 16 P.2d 663 (1932).

Cross-examination.

Where defendant voluntarily takes the witness stand in his own behalf, he is subject to same rules applicable to other witnesses, and may be cross-examined in regard to all matters to which he has testified on his direct examination or connected therewith. State v. Hargraves, 62 Idaho 8, 107 P.2d 854 (1940).

It was improper cross-examination of defendant in prosecution for theft of calf to ask about statements made previously regarding an iron used to brand a certain cow when such evidence in nowise could be used to identify the calf alleged to have been stolen. State v. Dickens, 68 Idaho 173, 191 P.2d 364 (1948).

Impeachment.

Questions asked witness as to whether he knew reputation of defendant in criminal prosecution for truth, honesty, and integrity in community in which he resided in an attempt to impeach defendant, instead of inquiring as to defendant's "general" reputa-

tion, was improper as failing to conform to statutory requirements. State v. Branch, 66 Idaho 528, 164 P.2d 182 (1944), overruled on other grounds, State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953).

The impeachment of a defendant who testified in his own behalf by testimony purporting to show that defendant's reputation for truth, honesty, and integrity in community in which he resided was bad was improper, without defendant first putting his reputation therefor in issue. State v. Branch, 66 Idaho 528, 164 P.2d 182 (1945), overruled on other grounds, State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953).

Where defendant charged with theft of calf was not asked about statements made regarding an iron used to brand a certain cow on direct examination, cross-examination concerning such statements was improper. State v. Dickens, 68 Idaho 173, 191 P.2d 364 (1948).

Instructions.

It is not error to instruct jury in the language of the statute. State v. Levy, 9 Idaho 483, 75 P. 227 (1904).

Preliminary Hearing.

The cross-examination of the defendant regarding his failure to testify at the preliminary hearing deprived defendant of a fair trial and was a denial of due process. State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971).

Sentencing Hearing.

Magistrate's admonition during sentencing hearing that defendant's invocation of his right to remain silent would be used as an aggravating factor violated this section's unambiguous directive that a defendant's refusal to testify may not prejudice him or be used against him in the criminal proceeding. State v. Anderson, 130 Idaho 765, 947 P.2d 1013 (Ct. App. 1997).

Trial judge may not consider a defendant's silence or refusal to admit guilt with respect to uncharged or dismissed crimes in response to a direct request from the court at the sentencing hearing. State v. Heffern, 130 Idaho 946, 950 P.2d 1285 (Ct. App. 1997).

Limited immunity for earlier offense did not authorize the district court to question defendant in the way he did about the offense and then use his silence against him for the purposes of sentencing. State v. Heffern, 130 Idaho 946, 950 P.2d 1285 (Ct. App. 1997).

Collateral References. 21A Am. Jur. 2d, Criminal Law, § 1137 et seq.

75A Am. Jur. 2d, Trial, §§ 292, 293; 75B Am. Jur. 2d, Trial, §§ 1309-1313.

Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility. 6 A.L.R. 1608; 25 A.L.R. 339; 103 A.L.R. 350; 161 A.L.R. 233.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf. 33 A.L.R. 826.

Juvenile court, power of, to require children to testify. 151 A.L.R. 1229.

Accused who testifies in his own behalf as subject to cross-examination to show previous conviction in order to enhance punishment. 153 A.L.R. 1159.

Crime, right to cross-examine accused as to previous prosecution for, or conviction of, as affecting his credibility. 161 A.L.R. 233.

Court's duty to inform accused who is not represented by counsel of his right not to testify. 79 A.L.R.2d 643.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense. 67 A.L.R.3d 824.

19-3004. Compelling attendance of witness — Subpoena and how issued. — The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by:

1. A magistrate before whom an information is laid, for witnesses in the state, either on behalf of the people or of the defendant.

2. The prosecuting attorney, for witnesses in the state in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

3. The prosecuting attorney, for witnesses in the state in support of an indictment or information, to appear before the court in which it is to be tried.

4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state or without the state as provided in section 19-3005, as the defendant may require. [Cr. Prac. 1864, §§ 534, 538; R.S., R.C., & C.L., § 8148; C.S., § 9132; I.C.A., § 19-2904; am. 1935, ch. 10, § 1, p. 24.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Prosecuting attorney to issue subpoenas and other process requiring attendance of witnesses, § 31-2604.

Sec. to sec. ref. This section is referred to in §§ 19-3006, 19-3935.

19-3005. Uniform act to secure attendance of witnesses. — (1) Subpoenaing a Witness in This State to Testify in Another State. If a judge of a court of record in any state, which by its laws has made provisions for commanding persons within that state to attend and testify in criminal hearings or prosecutions in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court that a person being within this state is a material witness in such prosecution, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall notify the witness of such time and place.

If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution in the other state, and that the laws of the state in which the prosecution is pending and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process he shall issue a subpoena, with a copy of the certificate attached, directing the witness to attend and testify in the court where the hearing or prosecution is pending at a time and place specified in the subpoena.

If the witness, who is subpoenaed as above provided, after being tendered by some properly authorized person a prepaid, round trip airline ticket or, in the event that there is no regularly scheduled airline service available, a prepaid round trip ticket on any common carrier providing passenger transportation services to and from the court where the hearing or prosecution is pending and five dollars (\$5.00) for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the subpoena, he may be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

(2) **Witness From Another State Subpoenaed to Testify in This State.** If a person in any state, which by its laws has made provisions for commanding persons within its borders to attend and testify in criminal hearings or prosecutions in this state, is a material witness in a hearing or prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required at such hearing or prosecution. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is subpoenaed to attend and testify in the criminal hearing or prosecution in this state he shall be tendered the sum of fifteen cents (15¢) a mile for each mile by the ordinarily traveled route, one (1) way, to and from the court where the hearing or prosecution is pending and five dollars (\$5.00) for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the subpoena shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless such extended period of time is obtained by the written consent of such witness.

(3) **Have Exemption From Arrest and Service of Process.** If a person comes into this state in obedience to a subpoena directing him to attend and testify in a criminal hearing or prosecution in this state, he will not while in this state, pursuant to such subpoena, be subjected to arrest or the service of process, civil or criminal, in connection with any matter which arose before his entrance into this state under such subpoena.

If a person passes through this state while going to another state in obedience to a subpoena to attend and testify in a criminal hearing or prosecution in that state or while returning therefrom, he shall not while so passing through this state be subjected to arrest or the service of process,

civil or criminal, in connection with any matter which arose before his entrance into this state under such subpoena.

(4) **Uniformity of Interpretation.** This section shall be interpreted and construed so as to effectuate its general purpose to make uniform the law of the states which enact it.

(5) **Short Title.** This section may be cited as "Uniform Act to Secure the Attendance of Witnesses in Criminal Cases." [I.C.A., § 19-2904-A, as added by 1935, ch. 10, § 2, p. 24; am. 1990, ch. 386, § 1, p. 1063.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Examination of witness on commission, §§ 19-3201 — 19-3214.

Comp. leg. Cal. Penal Code §§ 1334 — 1334.6. (Deering).

Mont. Rev. Codes Ann. §§ 46-15-112, 46-15-113, 46-15-120.

Nev. Rev. Stat. §§ 174.395 — 174.445.

Utah. Code Ann. §§ 77-21-1 — 77-21-5.

Wash. Rev. Code, §§ 10.55.010 — 10.55.130.

Cited in: *Schwartzmiller v. State*, 108 Idaho 329, 699 P.2d 429 (Ct. App. 1985).

Due Diligence.

The trial court erred in finding a witness unavailable and his preliminary hearing testimony admissible where the state failed to use diligent and good faith efforts to locate and secure a witness' attendance at trial since, after mailing a subpoena to the witness and receiving the receipt, the prosecution lost track of him, and made no effort to use the procedure set forth in subsection (2) of this section to secure the attendance of the witness. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

19-3006. Form of subpoena. — A subpoena authorized by section 19-3004, Idaho Code, must be substantially in the following form:

The state of Idaho to A.B.:

You are commanded to appear before C.D., a justice of the peace of precinct, in county (or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the state of Idaho against E.F.

Given under my hand this day of,

G.H., Justice of the Peace, (or "J.K., Prosecuting Attorney," or "By order of the court, L.M., Clerk," or as the case may be).

If books, papers or documents are required, a direction to the following effect must be contained in the subpoena: "And you are required, also, to bring with you the following" (describing intelligibly the books, papers or documents required). [Cr. Prac. 1864, §§ 539, 540; R.S., R.C., & C.L., § 8149; C.S., § 9133; I.C.A., § 19-2905; am. 2002, ch. 32, § 6, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The reference to "section 19-3004" in the first part of this section read "the last section," but § 19-3005 was enacted by the legislature in 1935, and inserted in the Code at this particular place by legislative direction.

This section was enacted long before § 19-3005.

The words enclosed in parentheses so appear in the law as enacted.

Sections 5 and 7 of S.L. 2002, ch. 32, are compiled as §§ 19-2909 and 19-3602.

Sec. to sec. ref. This section is referred to in § 19-3935.

Cited in: *Idaho Galena Mining Co. v. Judge of Dist. Court*, 47 Idaho 195, 273 P. 952 (1929); *State v. Brown*, 98 Idaho 209, 560 P.2d 880 (1977).

19-3007. Service of subpoena. — A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally and informing him of its contents. [Cr. Prac. 1864, §§ 541, 542; R.S., R.C., & C.L., § 8150; C.S., § 9134; I.C.A., § 19-2906.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Sheriff's fee for service of subpoena in criminal actions, § 31-3203.

Sec. to sec. ref. This section is referred to in § 19-3935.

19-3007A. Service of subpoena by mail or messenger. — (1) Notwithstanding the provisions of section 19-3007, Idaho Code, a subpoena may be delivered by mail or messenger. Service shall be effected when the witness acknowledges receipt of the subpoena to the sender by telephone, by mail, or in person, and identifies himself or herself by reference to his date of birth and his driver's license number or social security number. The sender shall make a written notation of the identifying information obtained during any acknowledgement by telephone or in person. A subpoena issued and acknowledged pursuant to this section shall have the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt, and the subpoena may so state; provided, that a warrant of arrest or a body attachment may not be issued based upon a failure to appear after being subpoenaed pursuant to this section.

(2) A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for his appearance or testimony pursuant to a subpoena shall prove to the court that the party has complied with the provisions of this section. Such a continuance shall only be granted for a period of time which would allow personal service of the subpoena and a reasonable time for the witness to appear before the court. [I.C., § 19-3007A, as added by 1989, ch. 267, § 2, p. 653.]

Legislative Intent. Section 1 of S.L. 1989, ch. 267 read: "The legislature is aware that most witnesses in criminal proceedings are cooperative and would agree to appear and testify before a court if a subpoena is delivered to said witness by mail. The legislature finds that service and delivery of a subpoena by mail would significantly reduce the costs incurred by personal service, and that it would be in the best interests of the taxpayers of the state of Idaho that the sender of a subpoena have the option of serving a subpoena by mail."

Due Diligence.

The trial court erred in finding a witness unavailable and his preliminary hearing testimony admissible where the state failed to use diligent and good faith efforts to locate and secure a witness' attendance at trial since, after mailing a subpoena to the witness and receiving the receipt, the prosecution lost track of him, and made no effort to use the procedure set forth in section 19-3005(2) to secure the attendance of the witness. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999).

19-3008. Fees and mileage of witnesses. — When a person shall attend before a grand jury, or the district court, as a witness, upon a subpoena, or pursuant to an undertaking, such person shall receive the same rate per mile as the state of Idaho pays for state employees pursuant to section 67-2008, Idaho Code, but no person can receive more than one (1) mileage under this section per day of attendance in court; such person shall also receive eight dollars (\$8.00) per day for each day's actual attendance as such witness and reasonable lodging expenses when approved in advance by the judge before whom the witness appears. Such mileage and per diem must be paid out of the county treasury of the county where such district court is held, upon the certificate of the clerk of said court: provided, however, that when a defendant in a criminal proceeding requires the attendance of more than five (5) witnesses in his behalf, before such witnesses shall be subpoenaed at the county's expense, or their fees and mileage be a charge against the county, such defendant must make affidavit setting forth that they are witnesses whose evidence is material to his defense, and that he can not safely go to trial without them. In such case the court, or the judge thereof, at any time application is made therefor, shall order a subpoena to issue to such of said witnesses as the court, or the judge thereof, may deem material for the defendant, and the costs incurred by the process and the fees and mileage of such witnesses shall be paid in the same manner that the costs and fees of other witnesses are paid. [R.S., § 8151; am. 1893, p. 20, § 1 reen. 1899, p. 172, § 1; am. 1899, p. 367, § 1; reen. R.C., & C.L., § 8151; C.S., § 9135; I.C.A., § 19-2907; am. 1961, ch. 5, § 1, p. 7; am. 1982, ch. 213, § 3, p. 587; am. 1985, ch. 122, § 8, p. 296.]

Compiler's notes. Section 2 of S.L. 1982, ch. 213 is compiled as § 9-1603.

Section 7 of S.L. 1985, ch. 122 is compiled as § 19-5303.

Section 9 of S.L. 1985, ch. 122 read: "This act shall be in full force and effect on October 1, 1985, and shall apply to persons against whom a criminal complaint or juvenile petition is filed on or after October 1, 1985."

Sec. to sec. ref. This section is referred to in § 19-3935.

ANALYSIS

Imprisonment for nonpayment.

Order for attendance.

Witnesses' certificates.

Imprisonment for Nonpayment.

Under this section convicted defendant can not be imprisoned for nonpayment of fees and mileage of witnesses necessary to establish his defense. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Order for Attendance.

Order for attendance of witnesses prescribed by this section must be made by court

and can not be made by judge at chambers, and, if so made, the county can not be compelled to pay fees to such witnesses. *Delano v. Board of Comm'rs*, 4 Idaho 83, 35 P. 841 (1894).

In order to entitle defendant to the benefit of this section, he must strictly comply therewith, and the necessity and materiality of additional witnesses must be shown before subpoenas will be issued, or any expense incurred chargeable to the county. *State v. Godard*, 4 Idaho 750, 44 P. 643 (1901).

Witnesses' Certificates.

Provisions of this section for witnesses' certificates is one of the instances authorizing treasurer to pay out money "as otherwise provided by law." *Ada County v. Clark*, 43 Idaho 489, 253 P. 847 (1927).

Mere proof of possession of certificates without evidence of actual or implied authority is not evidence of authority to collect, nor is payment to such holder payment to principal. *Ada County v. Clark*, 43 Idaho 489, 253 P. 847 (1927).

19-3009. Compulsory attendance of witnesses. — No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the Supreme Court, or a probate judge, upon an affidavit of the prosecuting attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness. [Cr. Prac. 1864, § 545; R.S., R.C., & C.L., § 8152; C.S., § 9136; I.C.A., § 19-2908.]

Sec. to sec. ref. This section is referred to in § 19-3935.

Service of Alienist.

Where no request for services of alienist

appears in record and no effort was made to secure attendance, continuance will not be granted to produce such witness from foreign state. *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924).

19-3010. Disobedience to subpoena. — Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt. A witness disobeying a subpoena issued on the part of the defendant, unless he show good cause for his nonattendance, is liable to the defendant in the sum of \$100, which may be recovered in a civil action. [Cr. Prac. 1864, §§ 546, 548; R.S., R.C., & C.L., § 8153; C.S., § 9137; I.C.A., § 19-2909.]

Sec. to sec. ref. This section is referred to in § 19-3935.

Public Policy.

Termination of AIDS consultant employed by the Idaho Department of Education for

responding to court-issued subpoena requiring testimony at a sentence reduction hearing was a violation of the public policy of the state of Idaho and was proper basis for claim of wrongful termination. *Hummer v. Evans*, 129 Idaho 274, 923 P.2d 981 (1996).

19-3011. Forfeiture of undertaking of witness. — When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail. [Cr. Prac. 1864, § 547; R.S., R.C., & C.L., § 8154; C.S., § 9138; I.C.A., § 19-2910.]

Cross ref. Distribution of forfeitures, § 19-4705.

Sec. to sec. ref. This section is referred to in § 19-3935 and I.C.R. 46.1.

19-3012. Production of imprisoned witness — Procedure. — When the testimony of a material witness for the people is required in a criminal action before a court of record of this state, and such witness is a prisoner in the state prison or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by a judge thereof; but in case the prison or jail is out of the county in which the application is made, such order can only be made upon the affidavit of the prosecuting attorney or other person on behalf of the people showing that the testimony is material and necessary; and even then the granting of the order is in the discretion

of the court or judge. The order must be executed by the sheriff of the county in which it is made, whose duty it is to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken. The expense of executing such order must be paid by the county in which the order is made. [R.S., R.C., & C.L., § 8155; C.S., § 9139; I.C.A., § 19-2911.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-3935.

Opinions of Attorney General. It is the responsibility of the sheriff and an expense to his or her county to transport an inmate from the prison back to the county where the inmate's attendance in court is required; however, in the case of female prisoners, clear statutory language places the responsibility upon the state Board of Corrections. OAG 83-11.

19-3013. Definitions. — As used in this act,

(a) "Witness" means a person who is confined in a penal institution in any state and whose testimony is desired in another state in any criminal proceeding or investigation by a grand jury or in any criminal action before a court.

(b) "Penal institutions" includes a jail, prison, penitentiary, house of correction, or other place of penal detention.

(c) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory of the United States. [1959, ch. 10, § 1, p. 25.]

Compiler's notes. The words "this act" refer to S. L. 1959, ch. 10 compiled as §§ 19-3013 — 19-3022.

Comp. leg. Utah. Code Ann. §§ 77-33-1 — 77-33-10.

Collateral References. Validity of uniform act to secure attendance of witnesses from without a state in criminal proceedings. 44 A.L.R.2d 732; 7 A.L.R.4th 836; 12 A.L.R.4th 742, 771.

19-3014. Summoning witness in this state to testify in another state. — A judge of a state court of record in another state, which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state, may certify (1) that there is a criminal proceeding or investigation, by a grand jury or a criminal action pending in the court, (2) that a person who is confined in a penal institution in this state may be a material witness in the proceeding, investigation or action, and (3) that his presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined, and upon notice to the attorney general, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him at the hearing. [1959, ch. 10, § 2, p. 25.]

19-3015. Court order. — If at the hearing the judge determines (1) that the witness may be material and necessary, (2) that his attending and testifying are not adverse to the interests of this state or to the health or legal rights of the witness, (3) that the laws of the state in which he is

requested to testify will give him protection from arrest and the service of civil and criminal process because of any act committed prior to his arrival in the state under the order, and (4) that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which he will be required to pass, the judge shall issue an order, with a copy of the certificate attached, (a) directing the witness to attend and testify, (b) directing the person having custody of the witness to produce him, in the court where the criminal action is pending, or where the grand jury investigation is pending, at a time and place specified in the order, and (c) prescribing such conditions as the judge shall determine. [1959, ch. 10, § 3, p. 25.]

19-3016. Terms and conditions. — The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his testimony, proper safeguards on his custody, and proper financial reimbursement or prepayment by the requesting jurisdiction for all expenses incurred in the production and return of the witness, and may prescribe such other conditions as the judge thinks proper or necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed. [1959, ch. 10, § 4, p. 25.]

19-3017. Exceptions. — This act does not apply to any person in this state confined as insane or mentally ill. [1959, ch. 10, § 5, p. 25.]

Compiler's notes. For words "this act" see
Compiler's notes, § 19-3013.

19-3018. Prisoner from another state summoned to testify in this state. — If a person confined in a penal institution in any other state may be a material witness in a criminal action pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify (1) that there is a criminal proceeding or investigation by a grand jury or a criminal action pending in the court, (2) that a person who is confined in a penal institution in the other state may be a material witness in a proceeding, investigation, or action, and (3) that his presence will be required during a specified time. The certificate will be presented to a judge of a court of record in the other state having jurisdiction over the prisoner confined, and a notice shall be given to the attorney general of the state in which the prisoner is confined. [1959, ch. 10, § 6, p. 25.]

19-3019. Compliance. — The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined. [1959, ch. 10, § 7, p. 25.]

19-3020. Exemption from arrest and service of process. — If a witness from another state comes into or passes through this state under an order directing him to attend and testify in this or another state, he shall not

while in this state pursuant to the order be subject to arrest or the service of process, civil or criminal, because of any act committed prior to his arrival in this state under the order. [1959, ch. 10, § 8, p. 25.]

19-3021. Uniformity of interpretation. — This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1959, ch. 10, § 9, p. 25.]

Compiler's notes. For words "this act" see Compiler's notes, § 19-3013.

19-3022. Short title. — This act may be cited as the "Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act." [1959, ch. 10, § 10, p. 25.]

Compiler's notes. Section 11 of S. L. 1959, ch. 10 read: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the

act which can be given effect without the invalid provision or application, and to this end the provisions of the act are severable."

For words "this act" see Compiler's note, § 19-3013.

19-3023. Child summoned as witness. — When a child is summoned as a witness in any hearing in any criminal matter, including any preliminary hearing, notwithstanding any other statutory provision, parents, a counselor, friend or other person having a supportive relationship with the child shall be allowed to remain in the courtroom at the witness stand with the child during the child's testimony unless in written findings made and entered; the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced. [I.C., § 19-3023, as added by 1983, ch. 206, § 1, p. 559; am. 1989, ch. 48, § 1, p. 61.]

Compiler's notes. Section 2 of S.L. 1983, ch. 206 declared an emergency. Approved April 13, 1983.

19-3024. Statements by child. — Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

- (a) Testifies at the proceedings; or

- (b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided,

that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements. [I.C., § 19-3024, as added by 1986, ch. 196, § 1, p. 493.]

Cited in: State v. Bingham, 116 Idaho 415, 776 P.2d 424 (1989).

ANALYSIS

Hearsay.
Preservation of objections.

Hearsay.

The trial court should not have considered the admission of the five-year-old victim's out-of-court statements or the testimony by the psychologist who counseled the victim as to other out-of-court statements, or the statements made by victim in her sleep overheard by family members; to the extent that this

section attempts to prescribe the admissibility of hearsay evidence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect. State v. Zimmerman, 121 Idaho 971, 829 P.2d 861 (1992).

Preservation of Objections.

A litigant who has made a motion in limine requesting advance rulings on the admissibility of hearsay testimony consisting of statements made by child to adult persons must continue to assert his objections as the evidence is offered or his objections are not preserved. State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988).

19-3024A. Alternative procedure for taking testimony of a child witness — Order — Presence of counsel and defendant — Filming, videotaping or transmitting of testimony. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 19-3024A, as added by 1989, ch. 53, § 2, p. 66; am. 1990, ch. 210, § 4,

p. 467, was repealed by S.L. 2003, ch. 152, § 1. For present comparable provisions, see §§ 9-1801 — 9-1808.

19-3025. Witness psychiatric, psychological examination. — Except upon the agreement of the parties, the court shall not order a witness in a prosecution for any offense or a victim of any offense to submit to a psychiatric or psychological examination for the purpose of assessing the witness's or victim's credibility. [I.C., § 19-3025, as added by 1989, ch. 304, § 1, p. 758.]

CHAPTER 31

EXAMINATION OF WITNESSES CONDITIONALLY

SECTION.

- 19-3101. Witnesses may be conditionally examined.
- 19-3102. Grounds for examination.
- 19-3103. Contents of application.
- 19-3104. Making of application.
- 19-3105. Order for examination.
- 19-3106. Proceedings in absence of county attorney.

SECTION.

- 19-3107. Discontinuance of examination.
- 19-3108. Subpoena for witness.
- 19-3109. Taking and authentication of testimony.
- 19-3110. Transmission of depositions.
- 19-3111. Use of deposition on trial.
- 19-3112. Deposition of imprisoned witness.

19-3101. Witnesses may be conditionally examined. — When a defendant has been held to answer a charge for a public offense, he may,

either before or after an indictment, have witnesses examined conditionally, on his behalf, as prescribed in this chapter, and not otherwise. [Cr. Prac. 1864, § 549; R.S., R.C., & C.L., § 8160; C.S., § 9140; I.C.A., § 19-3001.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Evidence, I.C.R. 26.

ANALYSIS

Bill of discovery.

Failure to request.

Bill of Discovery.

This section does not contemplate the use of a bill of discovery by the defendant, and it is immaterial that the application is made by motion if the same relief is sought that is obtainable on a bill of discovery. *Idaho Galena Mining Co. v. Judge of Dist. Court*, 47 Idaho 195, 273 P. 952 (1929).

Failure to Request.

Where no application appeared in the

record for conditional examination of witness who was with the accused on the day of alleged commission of assault with intent to commit murder and who left the state and there was no showing that the witness would have offered testimony different from the other or that the state hindered the accused's efforts to obtain the witness, there was no error on the ground that the witness was not available to testify. *State v. Brown*, 94 Idaho 352, 487 P.2d 946 (1971).

Collateral References. 23 Am. Jur. 2d, Depositions and Discovery, § 1 et seq.

26B C.J.S., Depositions, § 1 et seq.

Sufficiency of showing grounds for admission of deposition in criminal case. 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial. 94 A.L.R.2d 1172.

19-3102. Grounds for examination. — When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally. [Cr. Prac. 1864, § 555; R.S., R.C., & C.L., § 8161; C.S., § 9141; I.C.A., § 19-3002.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Territory v. Evans*, 2 Idaho (Hasb.) 651, 23 P. 232, 7 L.R.A. 646 (1890).

19-3103. Contents of application. — The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action.
3. The name and residence of the witness, and that his testimony is material to the defense of the action.
4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial. [Cr. Prac. 1864, § 553; R.S., R.C., & C.L., § 8162; C.S., § 9142; I.C.A., § 19-3003.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3104. Making of application. — The application may be made to the court during the term thereof, or to the judge in vacation, and must be upon three days' notice to the prosecuting attorney. [Cr. Prac. 1864, § 554; R.S., R.C., & C.L., § 8163; C.S., § 9143; I.C.A., § 19-3004.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3105. Order for examination. — If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the prosecuting attorney, within a specified time before that fixed for the examination. [Cr. Prac. 1864, § 555; R.S., R.C., & C.L., § 8164; C.S., § 9144; I.C.A., § 19-3005.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3106. Proceedings in absence of county attorney. — The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the prosecuting attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed. [R.S., R.C., & C.L., § 8165; C.S., § 9145; I.C.A., § 19-3006.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3107. Discontinuance of examination. — If the prosecuting attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick and infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed. [R.S., R.C., & C.L., § 8166; C.S., § 9146; I.C.A., § 19-3007.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3108. Subpoena for witness. — The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken. [R.S., R.C., & C.L., § 8167; C.S., § 9147; I.C.A., § 19-3008.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3109. Taking and authentication of testimony. — The testimony given by the witness must be reduced to writing and authenticated in the same manner as the testimony of a witness taken in support of an information. [R.S., R.C., & C.L., § 8168; C.S., § 9148; I.C.A., § 19-3009.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3110. Transmission of depositions. — The deposition taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial. [R.S., R.C., & C.L., § 8169; C.S., § 9149; I.C.A., § 19-3010.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3111. Use of deposition on trial. — The deposition, or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state. Upon reading the depositions in evidence, the same objections may be taken to a question or answer contained therein, as if the witness had been examined orally in court. [Cr. Prac. 1864, § 569; R.S., R.C., & C.L., § 8170; C.S., § 9150; I.C.A., § 19-3011.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3112. Deposition of imprisoned witness. — When a material witness for a defendant, under a criminal charge, is a prisoner in the state prison, or in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken on behalf of the defendant, in the same manner provided in the case of a witness who is sick, and the provisions of this chapter, so far as applicable, govern in the application for, and in the taking and use of, such deposition. Such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated. Every officer before whom testimony is taken by virtue hereof shall have authority to administer, and must administer, an oath to the witness that his testimony shall be the truth, the whole truth, and nothing but the truth. [R.S., R.C., & C.L., § 8171; C.S., § 9151; I.C.A., § 19-3012.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 32

EXAMINATION OF WITNESSES ON COMMISSION

SECTION.

- 19-3201. Examination of nonresident witness.
- 19-3202. Application for order.
- 19-3203. Commission defined.
- 19-3204. Affidavit to accompany application.
- 19-3205. Making of application.
- 19-3206. Order for commission.
- 19-3207. Interrogatories, how settled and allowed.

SECTION.

- 19-3208. Direction as to return.
- 19-3209. Execution of commission.
- 19-3210. Delivery of commission to agent.
- 19-3211. Death or disability of agent.
- 19-3212. Filing of commission.
- 19-3213. Commission open for inspection.
- 19-3214. Use and objections to depositions.

19-3201. Examination of nonresident witness. — When an issue of fact is joined upon an indictment the defendant may have any material witness, residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise. [R.S., R.C., & C.L., § 8176; C.S., § 9152; I.C.A., § 19-3101.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Depositions, I.C.R. 15.
Discovery and inspection, I.C.R. 16.

Uniform act to secure attendance of witnesses, § 19-3005.

19-3202. Application for order. — When a material witness for the defendant resides out of the state the defendant may apply for an order that the witness be examined on a commission. [R.S., R.C., & C.L., § 8177; C.S., § 9153; I.C.A., § 19-3102.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3203. Commission defined. — A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission. [Cr. Prac. 1864, § 551; R.S., R.C., & C.L., § 8178; C.S., § 9154; I.C.A., § 19-3103.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3204. Affidavit to accompany application. — The application must be made upon affidavit, stating:

1. The nature of the offense charged.
2. The state of the proceedings in the action, and that an issue of fact has been joined therein.
3. The name of the witness, and that his testimony is material to the defense of the action.
4. That the witness resides out of the state. [Cr. Prac. 1864, § 553; R.S., R.C., & C.L., § 8179; C.S., § 9155; I.C.A., § 19-3104.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3205. Making of application. — The application may be made to the court during the term, or to the judge in vacation, and must be upon three (3) days' notice to the prosecuting attorney. [Cr. Prac. 1864, § 554; R.S., R.C., & C.L., § 8180; C.S., § 9156; I.C.A., § 19-3105.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3206. Order for commission. — If the court or judge to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission. [Cr. Prac. 1864, §§ 555, 556; R.S., R.C., & C.L., § 8181; C.S., § 9157; I.C.A., § 19-3106.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Discretion of Court.

Where application is made to take testimony outside of this state under this section, the granting or refusing of such application is within the discretion of trial judge. *State v. Wetter*, 11 Idaho 433, 83 P. 341 (1905).

19-3207. Interrogatories, how settled and allowed. — When the commission is ordered, the defendant must serve upon the prosecuting attorney, without delay, a copy of the interrogatories to be annexed thereto, with two days' notice of the time at which they will be presented to the court or judge. The prosecuting attorney may, in like manner serve upon the defendant or his counsel cross-interrogatories, to be annexed to the commission, with the like notice. In the interrogatories either party may insert any questions pertinent to the issue. When the interrogatories and cross-interrogatories are presented to the court or judge, according to the notice given, the court or judge must modify the questions so as to conform them

to the rules of evidence, and must endorse upon them his allowance and annex them to the commission. [Cr. Prac. 1864, §§ 557, 560; R.S., R.C., & C.L., § 8182; C.S., § 9158; I.C.A., § 19-3107.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3208. Direction as to return. — Unless the parties otherwise consent, by an endorsement upon the commission, the court or judge must endorse thereon a direction as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the action is pending, designating his name and the place where his office is kept. [Cr. Prac. 1864, § 561; R.S., R.C., & C.L., § 8183; C.S., § 9159; I.C.A., § 19-3108.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3209. Execution of commission. — The commissioner, unless otherwise specially directed, may execute the commission as follows:

1. He must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth and nothing but the truth.

2. He must cause the examination of the witness to be reduced to writing, and subscribed by him.

3. He must write the answers of the witness as near as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it until it conforms to what he declares is the truth.

4. If the witness decline answering a question, that fact, with the reason assigned by him for declining, must be stated.

5. If any papers or documents are produced before him and proved by the witness, they, or copies of them, must be annexed to the deposition subscribed by the witness and certified by the commissioner.

6. The commissioner must subscribe his name to each sheet of the deposition, and annex the deposition, with the papers and documents, proved by the witness, to the commission, and must close it up under seal, and address it as directed by the endorsement thereon.

7. If there is a direction on the commission to return it by mail, the commissioner must immediately deposit it in the nearest post-office. If any other direction is made by the written consent of the parties, or by the court or judge, on the commission, as to its return, he must comply with the direction. A copy of this section must be annexed to the commission. [Cr. Prac. 1864, §§ 562, 563; R.S., R.C., & C.L., § 8184; C.S., § 9160; I.C.A., § 19-3109.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3210. Delivery of commission to agent. — If the commission and return is delivered by the commissioner to an agent he must deliver the same to the clerk to whom it is directed or to the judge of the court in which the indictment is pending, by whom it may be received and opened, upon the agent making affidavit that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it. [Cr. Prac. 1864, § 564; R.S., R.C., & C.L., § 8185; C.S., § 9161; I.C.A., § 19-3110.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Sec. to sec. ref. This section is referred to in § 19-3212.

19-3211. Death or disability of agent. — If the agent is dead, or from sickness or other casualty unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty unable to deliver it; that it has not been opened or altered since the person making the affidavit received it; and that he believes it has not been opened or altered since it came from the hands of the commissioner. [Cr. Prac. 1864, § 565; R.S., R.C., & C.L., § 8186; C.S., § 9162; I.C.A., § 19-3111.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3212. Filing of commission. — The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending.

If the commission and return is transmitted by mail, the clerk to whom it is addressed must receive it from the post-office, and open and file it in his office, where it must remain, unless otherwise directed by the court or judge. [Cr. Prac. 1864, §§ 566, 567; R.S., R.C., & C.L., § 8187; C.S., § 9163; I.C.A., § 19-3112.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3213. Commission open for inspection. — The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same or of any part thereof, on payment of his fees. [Cr. Prac. 1864, § 568; R.S., R.C., & C.L., § 8188; C.S., § 9164; I.C.A., § 19-3113.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3214. Use and objections to depositions. — The depositions taken under the commission may be read in evidence by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever; and the same objections may be taken to a question in the interrogatories or to an answer in the deposition, as if the witness had been examined orally in court. [Cr. Prac. 1864, § 569; R.S., R.C., & C.L., § 8189; C.S., § 9165; I.C.A., § 19-3114.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Testimony at Former Trial.

When it is properly shown that a witness at a former trial is beyond the jurisdiction of the court and that proper diligence has been used in an unsuccessful effort to secure witness's attendance, it is not reversible error for the court to permit the prosecuting attorney to read such testimony to the jury upon a second trial. *State v. Brassfield*, 40 Idaho 203, 232 P. 1 (1925).

The testimony of a deceased witness given at a former trial may be read as evidence at a subsequent trial between the same parties involving the same issues. *State v. Brassfield*, 40 Idaho 203, 232 P. 1 (1925); *State v. Ward*, 51 Idaho 68, 1 P.2d 620 (1931); *State v. Johnston*, 62 Idaho 601, 113 P.2d 809 (1941).

Reading of evidence of a witness on a former trial on a sufficient showing of inability to produce witness is within the court's discretion. *State v. Ward*, 51 Idaho 68, 1 P.2d 620 (1931).

Collateral References. Use of deposition or testimony of deceased witness. 15 A.L.R. 495; 79 A.L.R. 1392; 122 A.L.R. 425; 159 A.L.R. 1240.

CHAPTER 33

INQUIRY INTO SANITY OF DEFENDANT

SECTION.

19-3301 — 19-3307. Inquiry into sanity of defendant — Procedure. [Repealed.]

19-3301 — 19-3307. Inquiry into sanity of defendant — Procedure. [Repealed.]

Compiler's notes. These sections, comprising Cr. Prac. 1864, §§ 570-579; R. S., R.C., & C.L., §§ 8194-8200; C.S., §§ 9166-

9172; I.C.A., §§ 19-3201 — 19-3207, were repealed by S.L. 1970, ch. 31, § 15. For present law, see §§ 18-207 — 18-215.

CHAPTER 34
COMPROMISING OFFENSES

SECTION.

19-3401. Compromise of offenses after satisfaction.

19-3402. Leave of court and prosecutor required.

SECTION.

19-3403. Mode of compromise exclusive.

19-3401. Compromise of offenses after satisfaction. — When a defendant is held to answer on a charge of misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it is committed:

1. By or upon an officer of justice, while in the execution of the duties of his office.

2. Riotously.

3. With an intent to commit a felony.

4. As an act of domestic violence as defined in section 39-6303(1), Idaho Code. [Cr. Prac. 1864, § 661; R.S., R.C., & C.L., § 8205; C.S., § 9173; I.C.A., § 19-3301; am. 1998, ch. 209, § 1, p. 737.]

Cross ref. Compounding crimes, § 18-1601.

Cited in: State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940); State v. Kleier, 69 Idaho 278, 206 P.2d 513 (1949); In re Lutz, 101 Idaho 24, 607 P.2d 1078 (1980).

Collateral References. 22 C.J.S., Criminal Law, § 41.

Construction in effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged. 42 A.L.R.3d 315.

19-3402. Leave of court and prosecutor required. — If the party injured appears before the court to which the depositions are required to be returned, at any time before trial, and acknowledges that he has received satisfaction for the injury, the court and the prosecutor may, in their discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the offense that was originally charged. [Cr. Prac. 1864, §§ 662, 663; R.S., R.C., & C.L., § 8206; C.S., § 9174; I.C.A., § 19-3302; am. 1998, ch. 209, § 2, p. 737.]

Cited in: State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940); In re Lutz, 101 Idaho 24, 607 P.2d 1078 (1980).

19-3403. Mode of compromise exclusive. — No public offense can be compromised, nor can any proceeding or prosecution for the punishment thereof upon a compromise be stayed, except as provided in this chapter. [Cr. Prac. 1864, § 664; R.S., R.C., & C.L., § 8207; C.S., § 9175; I.C.A., § 19-3303.]

Compiler's notes. A former section, which comprised Cr. Prac. 1864, § 664; R.S., R.C., & C.L., § 8207; C.S., § 9174; I.C.A., § 19-3302 was repealed by S.L. 1971, ch. 143, § 5, effective January 1, 1972, and the present section was added by S.L. 1972, ch. 336, § 10 effective April 1, 1972, in the same words as the section prior to its repeal.

Section 9 of S. L. 1972, ch. 336 is compiled as § 19-2601.

Section 11 of S. L. 1972, ch. 336 read: "Any laws of Idaho, other than this Code; that is Title 18 and the amended additional Sections to Title 19, remaining in force after the effective date of this act, which refer to certain provisions of law repealed under this act, shall be deemed to refer to those provisions of this act which are in substance the same or substantially the same as such repealed provisions."

Section 12 of S. L. 1972, ch. 336 read: "This act shall not impair or affect any act done, offense committed or right accruing, accrued,

or acquired or liability, penalty, forfeiture or punishment incurred prior to time this act takes effect, but the same may be enjoyed, asserted and enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed."

Section 13 of S. L. 1972, ch. 336 read: "If any chapter, section, subsection, subdivision, paragraph, sentence, part or provision of this act shall be found to be invalid or ineffective by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid chapter, section, subsection, subdivision, paragraph, sentence, part or provision, and this act as a whole shall not be declared invalid by reason of the fact that one or more chapters, sections, subsections, subdivisions, paragraphs, sentences, parts or provisions may be so found invalid."

Section 14 of S. L. 1972, ch. 336 declared an emergency and provided that the act should take effect on and after April 1, 1972.

CHAPTER 35

DISMISSAL OF ACTION

SECTION.

19-3501. When action may be dismissed.

19-3502. Continuance for cause.

19-3503. Defendant to be discharged.

19-3504. Dismissal on motion of court or prosecuting attorney.

SECTION.

19-3505. Nolle prosequi abolished.

19-3506. Effect of dismissal as bar.

19-3501. When action may be dismissed. — The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:

(1) When a person has been held to answer for a public offense, if an indictment or information is not found against him and filed with the court within six (6) months from the date of his arrest.

(2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the information is filed with the court.

(3) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found.

(4) If a defendant, charged with a misdemeanor offense, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant enters a plea of not guilty with the court.

(5) If a defendant, charged with both a felony or multiple felonies and a misdemeanor or multiple misdemeanors together in the same action or charging document, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the information is filed with the court.

(6) If a defendant, charged with both a felony or multiple felonies and a misdemeanor or multiple misdemeanors together in the same action or charging document, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found. [Cr. Prac. 1864, §§ 580, 581; R.S., R.C., & C.L., § 8212; C.S., § 9176; I.C.A., § 19-3401; am. 1980, ch. 102, § 1, p. 226; am. 1984, ch. 51, § 1, p. 91; am. 2001, ch. 23, § 1, p. 28; am. 2004, ch. 305, § 1, p. 854.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S.L. 1984, ch. 51 provided that the act should take effect July 1, 1984 and should apply only to those misdemeanor complaints filed on and after July 1, 1984.

Cross ref. Dismissal by the court, I.C.R. 48.

Pleadings and motions before trial, I.C.R. 12.

Cited in: *In re Moragne*, 6 Idaho 82, 53 P.3 (1898); *State v. Poynter*, 34 Idaho 504, 205 P.561, 208 P.871 (1921); *State v. Kleier*, 69 Idaho 278, 206 P.2d 513 (1949); *In re Carpenter*, 88 Idaho 567, 401 P.2d 800 (1965); *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969); *State v. Lindsay*, 96 Idaho 474, 531 P.2d 236 (1975); *State ex rel. Kohler v. Rasmussen*, 98 Idaho 829, 573 P.2d 148 (1977); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985); *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988); *State v. McNew*, 131 Idaho 268, 954 P.2d 686 (Ct. App. 1998); *McKeeth v. State*, — Idaho —, 84 P.3d 575 (Ct. App. 2004).

ANALYSIS

Application.

—Time after indictment or information.

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Application.

—Time After Indictment or Information.

This section addresses only the length of time elapsing after an indictment or information is filed; it does not refer to any period following a remittitur from an appeal after a trial once has been held. *State v. Scroggie*, 114 Idaho 188, 755 P.2d 485 (Ct. App. 1988).

Burden on State.

When a criminal defendant makes a prima facie showing that his right to a speedy trial is violated under this section, the burden is on the state to show "good cause" for the delay, just as the primary responsibility for bringing a case to trial is upon the state. *State v. Hobson*, 99 Idaho 200, 579 P.2d 697 (1978).

Constitutionality.

The right to a speedy trial has been enhanced, not diminished, by subdivision (3) of this section; therefore, this subdivision is constitutionally sound without retroactive application to cases pending on its effective date. *State v. Brooks*, 109 Idaho 726, 710 P.2d 636 (Ct. App. 1985).

Constitutional Rights.

Defendant's constitutional right to a speedy trial is a trial as soon as reasonably possible. *Ex parte Rash*, 64 Idaho 521, 134 P.2d 420 (1943).

The term "speedy trial" means that one accused of crime should be tried not later than the next term of court subsequent to being held to answer, unless the trial is delayed on defendant's application, or postponed with his consent or other lawful valid reason. *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954).

Under constitutional provisions providing for a speedy trial, "speedy trial," being of indeterminate meaning, is subject to construction by the legislature which must be read in connection with the constitutional provision and be given effect as a legislative definition of what constitutes a "speedy trial." *Schrom v. Cramer*, 76 Idaho 1, 275 P.2d 979 (1954).

Any delay caused by the defendant's resistance to extradition is tolled for the purposes of a speedy trial. *Balla v. State*, 97 Idaho 378, 544 P.2d 1148 (1976).

Unlike the statutory speedy trial guarantee, which measures timeliness from the date of filing the information or indictment, the constitutional guarantees apply from the date when either formal charges are filed or the defendant is arrested, whichever occurs first. *State v. Hernandez*, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

Continuance to Next Term.

When arraignment was had too late in term to allow accused his statutory time of two days to prepare for trial, there is no objection to continuing case until next term, especially where accused consented to such continuance. *State v. Athens*, 36 Idaho 224, 210 P. 133 (1922).

Accused, though not entitled to discharge on habeas corpus for failure to bring him to trial at the term following the filing of the information, was entitled to trial notwithstanding the difficulty of obtaining witnesses and jurors owing to war conditions. *Ex parte Rash*, 64 Idaho 521, 134 P.2d 420 (1943).

Where defendant's attorney agreed to postpone a preliminary motion until after jury was sworn upon agreement by state that no rights of the defendant were waived, and after the jury had been sworn, the defendant's attorney presented four motions, the last of which was to move for dismissal on the ground that as case was not brought up for trial in the term following finding of indictment, there was no binding agreement, as minds of the attorneys involved had not met. *State v. Shaw*, 69 Idaho 365, 207 P.2d 540 (1949).

Where defendant was held to answer during spring term, but no information was filed until November 21 during fall term, and trial of case was continued until next term of court on request of defendant, there was a waiver of the right to a speedy trial. *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954).

Where defendant was bound over on a charge of grand larceny during the term following his arrest and an information filed against him during the same term and defendant moved for dismissal of the information at the opening of the next term on the ground that he had been denied a speedy trial, the trial judge properly denied such motion, for the state had until the end of the term during which the motion to dismiss was filed to bring the defendant to trial. *Schrom v. Cramer*, 76 Idaho 1, 275 P.2d 979 (1954).

In statute providing for dismissal of prosecution or indictment if the defendant is not indicted at the next term of court at which he is held to answer or if he is not brought to trial at the next term of court in which the indictment is triable "next term of the court" excludes the term of court then current and means the next ensuing term. *Schrom v.*

Cramer, 76 Idaho 1, 275 P.2d 979 (1954).

In statute providing for dismissal of indictment if the defendant is not brought to trial at the next term of the court at which he is held to answer, "next term" excludes the term of court then current and means the next ensuing term and the requirement that an information or indictment be filed against the defendant not later than the following term of court after his commitment unless good cause to the contrary be shown is met. *Schrom v. Cramer*, 76 Idaho 1, 275 P.2d 979 (1954).

Defendant Awaiting Retrial.

Drawing a line between criminal defendants awaiting their first trials and those awaiting retrial following successful appeals bears a rational relationship to legitimate government objectives and fact that by its terms this section does not create a statutory right for defendant's awaiting retrial following a successful appeal does not offend equal protection principles of the Idaho Constitution. *State v. Avelar*, 129 Idaho 700, 931 P.2d 1218 (1997).

Demand, Necessity.

Demand for speedy trial must be voiced by accused if he is to avail himself of his constitutional rights to a speedy trial. *State v. Linn*, 93 Idaho 430, 462 P.2d 729 (1969).

Subdivision 2 of this section is self-executing; it is not necessary for a defendant to affirmatively request a trial setting within the six months' period. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

Discharge of Defendant.

If good cause for the continuance is shown, the accused is not entitled to be discharged. *Ex parte Rash*, 64 Idaho 521, 134 P.2d 420 (1943).

A defendant against whom a complaint for issuing fraudulent checks had been filed March 6, 1964, and who, on September 29, 1964, and December 18, 1964, requested a speedy trial was entitled to be discharged upon failure of the state to try him by May 4, 1965. *Jacobson v. Winter*, 91 Idaho 11, 415 P.2d 297 (1966).

Discretion of Court.

There is no fixed rule for determining good cause for delay of trial; the matter—initially, at least—is left to the discretion of the trial court. Because there is no hard and fast rule for determining "good cause," the ultimate question of whether legal excuse has been shown is a matter for judicial determination upon the facts and circumstances of each case. *State v. Naccarato*, 126 Idaho 10, 878 P.2d 184 (Ct. App. 1994).

Dismissal and Refiling of Charge.

If a felony case is dismissed pursuant to I.C.R. 48(a)(2), the six-month requirement of this section is renewed upon the refile of the charge. *State v. Horsley*, 117 Idaho 920, 792 P.2d 945 (1990).

Disposal of Case.

Where district court on appeal of conviction from probate court entered judgment against defendant and sureties, good cause for failure to try defendant at next term was shown, since court had disposed of case. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

Good Cause.

If the dismissal and renewal of the prosecution were to be regarded as postponement, it was for "good cause" and "sufficient reason" and was therefore authorized, since the absence of a material and essential witness is "good cause." *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

In determining the issue of justifiable or "good cause," it is appropriate to consider the length of the delay, the reasons for the delay, the accused's assertion of his speedy trial right, and the prejudice occasioned by the delay; in considering the issue of prejudice, the following interests must be examined; (1) the prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern of the accused, and (3) limiting of the possibility that the defense will be impaired. *State v. Russell*, 108 Idaho 58, 696 P.2d 909 (1985).

When a criminal defendant makes a prima facie showing that his right to a speedy trial is violated under this section, the district court must determine whether there was "good cause" for the delay; the burden is on the state to show "good cause" for the delay. *State v. Gabrielson*, 109 Idaho 507, 708 P.2d 912 (Ct. App. 1985).

Where the reasons for the delay were real, the length of the delay was less than one month, and the defendant has not attempted to show any prejudice to him by the delay, the delay was for "good cause." *State v. Gabrielson*, 109 Idaho 507, 708 P.2d 912 (Ct. App. 1985).

Although the district court initially scheduled the trial date beyond the six month period required by subdivision 2 of this section, "good cause" existed for the delay in the trial, where the out-of-state expert requested by the defense to further assist in presenting the mental illness defense was appointed only nine days before the expiration of the six-month period. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

If there is no good cause for the delay of the trial or if the trial was not postponed at the

defendant's request, then the charge against the accused must be dismissed and the inquiry is at an end. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

The court erred in failing to dismiss the action, where good cause for delay of the trial was based upon the defendant's failure to pursue her earlier motion to dismiss in accordance with the agreed time schedule. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

There is no fixed rule for determining good cause for delay of trial; the matter—initially at least—is left to the discretion of the trial court. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

Good cause for delay of the trial means a substantial reason; one that affords a legal excuse. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

Trial judges do not have unbridled discretion to find "good cause;" the Court of Appeals will independently review the lower court's decision. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

The district court did not abuse its discretion by continuing defendant's trial about two and one-half months where the trial began within six months of the filing of the criminal information and where the basis for the continuance (that "another trial was going on ...") was an adequate reason. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

The district court has discretion in determining whether "good cause" exists to justify a continuance in the trial. *State v. Lewis*, 123 Idaho 336, 848 P.2d 394 (1993).

Where good cause had been shown for the 38-day delay between the time the information was filed and the hearing for the motion to dismiss, defendant's motion to dismiss for failure to timely prosecute was properly denied. *State v. Lund*, 124 Idaho 290, 858 P.2d 829 (Ct. App. 1993).

Where district court found that the court's congested trial calendar was the principal factor causing the delay in bringing defendant to trial, such factor was a neutral factor in "good cause" evaluation under this section. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

Information.

Where the information was filed six months and three days after the defendant's arrest, the original charge was dismissed, and rather than being rearrested, the defendant received a summons to appear, the service of the summons was the functional equivalent of an arrest, and the statutory clock began to run anew; therefore, subdivision 1. of this section was not violated when the information was filed within six months of the service of the summons. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Loss of Papers.

Loss of criminal complaint, together with the fact that knowledge of loss was not communicated to prosecuting attorney until about two weeks before beginning of the next term of court and press of business on part of prosecuting attorney, is not cause for retaining a criminal prosecution where information is not filed at the next term as required by this section, and accused is entitled to be discharged. *In re Jay*, 10 Idaho 540, 79 P. 202 (1905).

Misdemeanors.

The requirement of subdivision 2. of this section that prosecutions or indictments be dismissed if the defendant is not brought to trial within six months is not applicable to misdemeanors. *State v. Conrad*, 104 Idaho 799, 663 P.2d 1101 (1983) (Decision prior to 1984 amendment); *State v. Nichols*, 110 Idaho 823, 718 P.2d 1261 (Ct. App. 1986) (Decision prior to 1984 amendment).

Since misdemeanors do not involve the filing of an indictment or information but are prosecuted based upon a complaint or citation, subsection 1. of § 19-3501 was not applicable to defendant's arrest until April, 1995, when he was charged with a felony, and thus information filed on July 14, 1995, was filed within the six months required by subsection 1. of § 19-3501. *State v. Kelchner*, 130 Idaho 37, 936 P.2d 680 (1997).

New Trial.

Where a new trial is necessitated because a conviction has been reversed on appeal or set aside on habeas corpus, or where one complaint is dismissed and another filed, the delay between the original indictment and the ultimate trial is not due to any laches on the part of the state; it therefore does not entitle the accused to discharge under a statute providing that he must be discharged if his case is not brought to trial within a designated time after indictment. *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969).

Prejudicial Effect of Delay.

If defendant can show an unreasonable delay in prosecution, prejudice is presumed. *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969).

Where there was no contention that defendant's ability to present his defense was impeded by the delay in trying defendant and he had not alleged or shown that he was prejudiced by the delay in any way, no weight could be ascribed to the factor of prejudice in his claim of denial of a speedy trial. *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

Reasonable Delays.

Delay occasioned by prosecutor filing complaint in a court without jurisdiction was not

unreasonable delay violative of rights of accused where prosecutor apparently acted in good faith and believed, and had reason to believe, such court had jurisdiction. *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969).

Delays by the prosecution which are reasonable are not deemed to violate this section. *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969).

Defendant's right to a speedy trial guaranteed under this section was not abridged by the trial setting six months and forty-seven days after entry of his not guilty plea, where parties stipulated at oral agreement that court congestion was the sole reason for delayed trial setting and defendant conceded that he was unable to show prejudice on account of delays. *State v. Naccarato*, 126 Idaho 10, 878 P.2d 184 (Ct. App. 1994).

Where delay of sixty-five days elapsed from the six-month period allowed for commencement of trial and the actual commencement of defendant's trial, a delay of such duration, though significant, did not weight heavily in favor of dismissal. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

Where district court carefully weighed relevant factors concerning defendant's right to a speedy trial: the length of delay, the reason for the delay, the defendant's assertion of his right to a speedy trial and the issue of prejudice to the defendant occasioned by delay, and concluded that the balance tipped against dismissal, there was no error. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

Defendant was not prejudiced where it took 13 months to bring his case to trial since much of the delay was caused by defendant's own actions which included a late filing of a motion to suppress evidence and hiring a new attorney. *State v. Rodriguez-Perez*, 129 Idaho 29, 921 P.2d 206 (Ct. App. 1996).

Where defendant's request for a substitute attorney made it necessary for the trial court to postpone the trial to prevent defendant from being prejudiced by his new attorney's inability to prepare for the earlier trial date, that postponement could certainly not be attributed to the State; thus this four-month delay negated defendant's speedy trial argument. *State v. Reutzel*, 130 Idaho 88, 936 P.2d 1330 (Ct. App. 1997).

Speedy Trial.

Defendant was not entitled to have information dismissed under this section on the grounds that the trial court had failed to grant him a speedy trial where a new information had been filed in the term succeeding the term in which the complaint was filed, such new information requiring a new arraignment and plea and the defendant was not tried until the second following term. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957).

The dismissal of the information and release of defendant's bail was not a bar to another prosecution, commenced within three years after the commission of the offense. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Where defendant was tried at the first term commencing after the filing of the new information, his constitutional right was accorded to him for a speedy trial. *State v. Goodmiller*, 86 Idaho 233, 386 P.2d 365 (1963).

Where mere defect in form of warrant of commitment for alleged first degree burglary resulted in discharge of defendant upon habeas corpus order, subsequent prosecution following rearrest and commitment, for the same crime, less than a month after writ was made permanent, was not improper and no denial of defendant's right to speedy trial. *State v. Stewart*, 87 Idaho 210, 392 P.2d 180 (1964).

Where defendant's trial was held at the beginning of the next term of court after the complaint was filed, the warrant of arrest was served, and the information was filed, it was well within the time period set by the legislature in its statutory implementation of the constitutional right to speedy trial. *State v. Wilbanks*, 95 Idaho 346, 509 P.2d 331 (1973).

The four-fold balancing test for speedy trial claims enunciated by the United States Supreme Court in *Barker v. Wingo* is not applicable when this section has been violated. *State v. Hobson*, 99 Idaho 200, 579 P.2d 697 (1978).

The action of the legislature in repealing former § 1-706, governing terms of court, and the action of the Supreme Court in promulgating I.R.C.P., Rule 77(a), abolishing terms of court, precludes determining the right to a speedy trial by reference to terms of court for cases filed after the effective date (March 31, 1975) of the repeal of § 1-706. *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981); *State v. Talmage*, 104 Idaho 249, 658 P.2d 920 (1983).

Where there was a seven-and-one-half-month delay between the date the criminal complaint was issued and the date of trial, but there was no indication that the prosecution engaged in dilatory tactics, and the delay caused by improper jury selection followed from defendant's motion to dismiss, and where no prejudice was shown, defendant's right to speedy trial was not violated. (See 2004 amendment of this section). *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981).

A seven-and-one-half-month delay between the defendant's first trial, which ended in a mistrial, and his second trial did not constitute a denial of the defendant's right to a speedy trial, where more than six months of the delay was attributable to the defendant's refusal to answer the questions asked of him

on cross-examination during his first trial and the ensuing contempt and commitment proceeding and order issued against the defendant, where the defendant did not assert his right to a speedy trial until just two and one-half weeks prior to his second trial, and where the defendant failed to allege or show that he was prejudiced by the delay. (See 2004 amendment of this section). *State v. Talmage*, 104 Idaho 249, 658 P.2d 920 (1983).

A delay of 12 months is sufficient to trigger an inquiry into whether speedy trial has been denied. (See 2004 amendment of this section). *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

Where there was a delay of approximately 12 months between the filing of the complaint against defendant and the date of trial, and where some of the delay was attributable to the state but most of the delay was caused by defendant's motion to suppress or by motions of codefendant and there was no objection to delay interposed by defendant, the reasons for the delay weighed more heavily against defendant and were more properly attributable to him than the state in determining if his right to a speedy trial had been violated. (See 2004 amendment of this section). *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

Where complaint was filed against defendant December 9, 1977 and, after many delays, trial was set for November 27, 1978 and on November 1, 1978 defendant filed motion to dismiss for lack of speedy trial, the fact that after making this demand known he was tried within a month and that he had not made any earlier or insistent demand for trial weighed against rather than in favor of defendant's claim of denial of speedy trial. (See 2004 amendment of this section). *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

The limitations of this section do not apply where a defendant requesting a postponement of trial date has been explicitly advised of his speedy trial rights and of the problems that will be presented if his postponement request is granted, nevertheless specifically waives his speedy trial right, and thereafter, because of his own actions, cannot be granted a speedy trial. *State v. Russell*, 108 Idaho 58, 696 P.2d 909 (1985).

Time absorbed by a prosecutor's appeal from a magistrate's dismissal of charges is germane to a speedy trial claim. *State v. Fairchild*, 108 Idaho 225, 697 P.2d 1239 (Ct. App. 1985).

Because subdivision 1. of this section applies only when a criminal prosecution lies, and because the defendant could not be criminally prosecuted until the order waiving jurisdiction under the Youth Rehabilitation Act

became final, he was not denied his statutory right to a speedy trial under subdivision 1 of this section. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

When an alleged violation of the right to speedy trial is in issue, the court must first determine if this section has been abridged; if this section is applicable and there is no "good cause" for the delay or the trial was not postponed at the defendant's request, then the charge against the accused must be dismissed and the inquiry is at an end. But, if this section is not implicated, then the court must next determine whether the constitutional provisions, both state and federal, relating to speedy trial have been violated. (See 2004 amendment of this section). *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

Where, due to rescheduling, defendant's case was tried six months and 24 days after defendant entered his plea of not guilty, and where the delay in bringing defendant to trial was not attributable to either the prosecution or the defendant, but was solely attributable to the overly burdened trial calendar of the court, the defendant was not entitled to a dismissal pursuant to this section. (See 2004 amendment of this section). *State v. Sindak*, 116 Idaho 185, 774 P.2d 895 (1989), cert. denied, 493 U.S. 1076, 110 S. Ct. 1125, 107 L. Ed. 2d 1032 (1990).

With regard to defendant's claim that he was denied a speedy trial, if a trial is postponed upon application of the defendant the six-month deadline in this section is not applicable. *State v. Kysar*, 116 Idaho 992, 783 P.2d 859 (1989).

In considering the dismissal of a case for denial of the right to a speedy trial under this section, the trial court is required by *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) to weigh the circumstances of delay against any prejudice suffered by the defendant. *State v. Aberasturi*, 117 Idaho 201, 786 P.2d 592 (Ct. App. 1990).

Where the interval between the filing of information and the defendant's filing of his motion to dismiss for lack of speedy trial was approximately eight months and was sufficient to trigger an inquiry into whether a speedy trial has been denied, the eight-month period is not in itself so excessive as to outweigh other balancing factors. (See 2004 amendment of this section). *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

In determining whether there has been a denial of a speedy trial, where the defendant was arrested for unknown crimes in another county, subsequently left the state and did not

notify his own attorney or the prosecutor of his departure or whereabouts, the state met its burden by showing that the prosecution made a reasonable endeavor to locate the defendant, to take action to procure his return, and to continue the prosecution as soon as he was located, and the reasons for the delay in this case weigh more heavily against the defendant and are more properly attributable to him than to the state. *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

Where the defendant was not subjected to oppressive pretrial incarceration nor was there any contention that his ability to present his defense was impeded by a delay, he has not alleged that he was prejudiced by the delay in any way and the court gave no weight to the factor of prejudice. *State v. Johnson*, 119 Idaho 56, 803 P.2d 557 (Ct. App. 1990).

Defendant waived his right to a speedy trial when his attorney asked for a continuance to prepare for the second trial. There was no reference in the record indicating that defendant wished to proceed to trial in spite of the motion for continuance filed by his attorney. *State v. Higgins*, 122 Idaho 590, 836 P.2d 536 (1992).

In determining whether a defendant's statutory speedy trial right has been violated, the defendant first must establish a prima facie violation of this section, which consists of a showing that 1) he was not brought to trial within six months of the entry of the not guilty plea and 2) the trial was not postponed upon his application. The burden then shifts to the prosecution to demonstrate good cause. *State v. Cotant*, 123 Idaho 787, 852 P.2d 1384 (1993).

The four-part balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) is the appropriate test for determining whether the right to speedy trial has been denied; the four factors to be considered in the balancing test: length of delay, reason for the delay, an assertion by the defendant of the right to a speedy trial, and prejudice to the defendant. *State v. Cotant*, 123 Idaho 787, 852 P.2d 1384 (1993).

Defendant, who agreed to plead guilty to a lesser offense midway through his trial that had been twice vacated and occurred eleven months after his being charged with rape, did not have his right to a speedy trial denied because his valid guilty plea, voluntarily and understandingly given, waived both the right to a speedy trial as well as the consideration of the denial of such right as fundamental error which could be raised for the first time on appeal. *State v. Garcia*, 126 Idaho 836, 892 P.2d 903 (Ct. App. 1995).

Unauthorized representations of defense

counsel, who allegedly told trial court that defendant would sign a waiver of his speedy trial right and would thereby consent to postponement of his trial, did not constitute a waiver of defendant's rights that would preclude defendant from asserting a violation of his right to a speedy trial. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

To establish a violation of his right to a speedy trial under this section, defendant must make a prima facie showing that he was not brought to trial within six months of the filing of the information and that the trial was not postponed at his request; upon such a showing, the burden then shifts to the prosecution to demonstrate good cause to the contrary. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

Where defendant did not assert his statutory right to a speedy trial until after the six-month period had expired, such factor did not lend weight to his argument for dismissal. *State v. Beck*, 128 Idaho 416, 913 P.2d 1186 (Ct. App. 1996).

In denying the defendant's motion to dismiss, which asserted his right to speedy trial at the start of the retrial, the court found that, although more than six months had elapsed since the date of the remittitur, the delay was caused by the court's full calendar, a neutral factor not attributable to either party. The court also found that the defendant had failed to show how he was prejudiced by the eight-day delay. Where the defendant was not subjected to oppressive pretrial incarceration or faced with circumstances which would impair his ability to defend his case, no prejudice was shown where the trial was set a few days after the six-month period had lapsed. *State v. Avelar*, 129 Idaho 704, 931 P.2d 1222 (Ct. App. 1996), *aff'd*, 129 Idaho 700, 931 P.2d 1218 (1997).

Although the constitutional right to a speedy trial is fundamental, this section expands this right in three specific circumstances and provides a speedy trial guarantee above and beyond those provided by the state and federal constitutions. As a statutory expansion of a fundamental constitutional right, the statutory right to a speedy trial is not fundamental. *State v. Avelar*, 129 Idaho 700, 931 P.2d 1218 (1997).

This section creates a speedy trial guarantee beyond the state and federal constitutional guarantees for three specific classes of defendants. It does not mention defendants awaiting retrial following successful appeal. By its terms, this section does not create a statutory right to a speedy trial for such defendants. *State v. Avelar*, 129 Idaho 700, 931 P.2d 1218 (1997).

Defendant's statutory right to a speedy trial did not apply until jurisdiction under the juvenile corrections statute had been waived.

State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

Abuse of discretion occurred when trial court determined that dismissal was warranted because State caused delay when it unsuccessfully sought review of rulings on a defendant's motions in limine; good faith appeal of rulings that profoundly affected the State's ability to prove defendant sexually abused a child was good cause for delay as a matter of law. *State v. Young*, 136 Idaho 113, 29 P.3d 949 (2001).

Waiver of Right.

Right of defendant to move for dismissal on ground that case had not been brought up for trial in term following finding of indictment was waived, when motion was not submitted until after jury was sworn. *State v. Shaw*, 69 Idaho 365, 207 P.2d 540 (1949).

Delays which are consented to by the accused constitute a waiver of the right to a speedy trial. *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969).

Delays in bringing a defendant to trial caused or consented to by the defendant are considered to constitute waiver of the right to be tried within the time affixed by statute or required by the Constitution. *State v. Talmage*, 104 Idaho 249, 658 P.2d 920 (1983); *State v. Campbell*, 104 Idaho 705, 662 P.2d 1149 (Ct. App. 1983).

Waiver, in the broad sense, is defined as the voluntary relinquishment of a known right; there must be expressed consent or affirmative conduct manifesting consent for waiver of a speedy trial, and every reasonable presumption against waiver must be indulged. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

Where the only record of a possible waiver was produced when the defendant was not present in court when the court noted that counsel for the three defendants was present and had indicated their willingness to waive speedy trial, minutes of the court show only that the defendant's counsel was directed to obtain waivers from the defendant and her co-defendants, no waivers were filed, nor did the defendant engage in affirmative conduct manifesting consent for waiver, the defendant's right to a speedy trial was not waived. *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987).

A notarized waiver of speedy trial signed by defendant and his counsel was dispositive of defendant's claim of denial of speedy trial. *State v. Youngblood*, 117 Idaho 160, 786 P.2d 551 (1990).

Defendant could not rely upon the statutory six-month time period for a speedy trial found in this section where he waived it in return for a continuance. *State v. Lundquist*, 134 Idaho 831, 11 P.3d 27 (2000).

Collateral References. 21A Am. Jur. 2d, Criminal Law, §§ 775 — 784.
 22A C.J.S., Criminal Law, § 424.
 27 C.J.S., Dismissal and Nonsuit, §§ 42 — 91.

Continuance of criminal case because of illness of accused. 66 A.L.R.2d 232.

19-3502. Continuance for cause. — If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued to a date subsequent, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued. [Cr. Prac. 1864, § 582; R.S., R.C., & C.L., § 8213; C.S., § 9177; I.C.A., § 19-3402; am. 1994, ch. 270, § 1, p. 833.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963).

ANALYSIS

Discretion of court.
 Waiver.

Discretion of Court.

It is improper for court to arbitrarily hold accused to answer charge of felony that has been fully and fairly investigated by a grand jury and dismissed, in absence of a showing that any further evidence can be produced, or that there was improper conduct by grand jury which considered the case. In re Moragne, 6 Idaho 82, 53 P. 3 (1898).

Defendant was not entitled to have information dismissed under § 19-3501 on the grounds that the trial court had failed to grant him a speedy trial where a new information had been filed in the term succeeding the term in which the complaint was filed, such new information requiring a new arraignment and plea and the defendant was not tried until the second following term.

State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

Application for continuance is addressed to sound judicial discretion of the court, and its ruling will not be reversed unless such discretion is abused. State v. Hopple, 83 Idaho 55, 357 P.2d 656 (1960).

Delays in bringing a person to trial which are caused by the requests of the defendant or by the appropriate and normal acts of the state are not a denial of a speedy trial. Balla v. State, 97 Idaho 378, 544 P.2d 1148 (1976).

The magistrate did not abuse her discretion in conducting the trial as scheduled, even though the defendant argued that the belated notice of the district court's dismissal of her interlocutory appeal prevented her from preparing her defense, because unless and until a stay is issued, a litigant may not pause in preparation for trial while interlocutory appeals are pending. State v. Harrold, 113 Idaho 938, 750 P.2d 959 (Ct. App.), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Waiver.

Where defendant was held to answer during spring term, but no information was filed until November 21 during fall term, and trial of case was continued until next term of court on request of defendant, there was a waiver of the right to a speedy trial. Ellenwood v. Cramer, 75 Idaho 338, 272 P.2d 702 (1954).

19-3503. Defendant to be discharged. — If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him. [Cr. Prac. 1864, § 583; R.S., R.C., & C.L., § 8214; C.S., § 9178; I.C.A., § 19-3403.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963).

19-3504. Dismissal on motion of court or prosecuting attorney. —

The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. [Cr. Prac. 1864, § 584; R.S., R.C., & C.L., § 8215; C.S., § 9179; I.C.A., § 19-3404.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Barter, 80 Idaho 552, 335 P.2d 887 (1959); State v. Goodmiller, 86 Idaho 233, 386 P.2d 365 (1963); State v. Dennard, 102 Idaho 824, 642 P.2d 61 (1982); State v. Fowler, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983); State v. Swartz, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985); State v. Harbaugh, 123 Idaho 835, 853 P.2d 580 (1993).

ANALYSIS

Agreement to dismiss charges.

Dismissal after appeal.

Validity.

Agreement to Dismiss Charges.

The Idaho Bureau of Narcotics (IBN) agent did not have authority to bind the State to an alleged promise that the charges against defendant would be dismissed if defendant performed certain narcotics buys on behalf of the IBN and gave the IBN the names of ten persons involved in dealing drugs; even if a plea bargain had existed in this case, which it did not, defendant made no showing that he

relied on any agreement to his detriment and under this section, only the district court has authority to dismiss felony charges. State v. Caswell, 121 Idaho 801, 828 P.2d 830 (1992).

Dismissal After Appeal.

When a judgment in a criminal case is reversed on ground that evidence is insufficient to justify verdict, trial court, on motion of county attorney, should dismiss case when it is shown that the state has no other or further evidence than that adduced on the first trial. State v. Seymour, 7 Idaho 548, 63 P. 1036 (1901).

Where it clearly appears that a person has been entrapped into the commission of a wrongful act, without criminal intent or design, he does not thereby become guilty of a crime, and the Supreme Court will reverse the judgment, order a dismissal of the cause and discharge accused from the penitentiary. State v. Mantis, 32 Idaho 724, 187 P. 268 (1920).

Validity.

Where the district court failed to set out in the minutes, its reasons for dismissing a case on motion of the prosecutor but the defendant did not seek to challenge the order of dismissal, such dismissal was valid. Stockwell v. State, 98 Idaho 797, 573 P.2d 116 (1977).

19-3505. Nolle prosequi abolished. — The entry of a nolle prosequi is abolished, and neither the attorney-general nor the prosecuting attorney can discontinue or abandon a prosecution for a public offense except as provided in the last section. [Cr. Prac. 1864, § 585; R.S., R.C., & C.L., § 8216; C.S., § 9180; I.C.A., § 19-3405.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3506. Effect of dismissal as bar. — An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony. [Cr. Prac. 1864, § 586; R.S., R.C., & C.L., § 8217; C.S., § 9181; I.C.A., § 19-3406.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *Olson v. State*, 92 Idaho 873, 452 P.2d 764 (1969); *State v. Griffith*, 98 Idaho 138, 559 P.2d 754 (1977); *State v. Swartz*, 109 Idaho 1033, 712 P.2d 734 (Ct. App. 1985).

ANALYSIS

Application.

Assault or murder.

Dismissal and refile.

Double jeopardy.

Motion of prosecutor or defendant.

Prosecution barred.

Prosecution not barred.

Reckless driving.

Sale or possession of liquor.

Same offense.

Application.

This section applies to voluntary dismissals on the prosecutor's motion as well as dismissals on motion by the defendant; in order for a dismissal to act as a bar, it must be valid and final. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

Whether this section is applicable depends upon a finding by the court that a subsequent charge is for the "same offense" as the previously dismissed charge. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

Assault or Murder.

Conviction of assault is no bar to prosecution for murder on the death of the assaulted person. *State v. Randolph*, 61 Idaho 456, 102 P.2d 913 (1940).

Dismissal and Refiling.

Where the prosecutor, in order to circumvent a ruling reducing the charge against a defendant from second-degree murder to voluntary manslaughter, moved to dismiss the original action and then filed a second complaint for second-degree murder, the defendant's rights under this section were not violated since the offense involved was a felony. *Stockwell v. State*, 98 Idaho 797, 573 P.2d 116 (1977).

Where the state asserted its belief that magistrate committed error in the prior case by deciding the evidence seized would ultimately be suppressed and there was no evidence to show that the state was not acting in a good faith belief that the magistrate had committed error, the dismissal without preju-

dice in the prior case did not bar refile of charges. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

Double Jeopardy.

Like the double jeopardy clauses, this section is intended to protect individuals against repeated charges and trials for the same offense, but unlike the constitutional double jeopardy clauses, this section does not require that the defendant actually be placed in jeopardy before the immunity attaches; a bare charge and dismissal is sufficient to act as a bar. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

Motion of Prosecutor or Defendant.

This section refers to dismissals on motion of prosecuting attorney as well as on motion of defendant. *State v. McKeehan*, 49 Idaho 531, 289 P. 993 (1930).

Prosecution Barred.

Where the contractor violated an ordinance which required him to obtain a permit to install non-code electrical improvements, the failure to obtain a permit was a single-event offense, and because this charge previously had been dismissed, the city was barred by this section from renewing the charge with respect to the same installation. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

Prosecution Not Barred.

The electrical contractor's failure to correct or remove a non-code installation was a separate offense from the failure to obtain a permit; therefore, the former dismissals of actions against the contractor for failure to obtain a permit did not bar this action. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

Since this section does not prevent the state from further prosecuting a defendant where the charge dismissed is a felony, when state dismissed DUI charge against defendant, it was not barred by this section from prosecuting him for vehicular manslaughter. *State v. Hinostroza*, 114 Idaho 621, 759 P.2d 912 (Ct. App. 1988).

Because the state filed a timely appeal to the dismissal of defendant's case, the dismissal was not final; therefore, upon reversal of the dismissal order, the case could be remanded for trial. *State v. Schmidt*, 121 Idaho 381, 825 P.2d 104 (Ct. App. 1992).

Reckless Driving.

The offense of reckless driving is a misdemeanor and the dismissal of an action started April 30, 1956, would be a bar to any other prosecution for the same offense. *State v. Barter*, 80 Idaho 552, 335 P.2d 887 (1959).

Sale or Possession of Liquor.

Dismissal of prosecution for possession of intoxicating liquor is not bar to prosecution for unlawful sale of liquor, even where same facts are basis of both prosecutions. *State v. McKeehan*, 49 Idaho 531, 289 P. 993 (1930).

Same Offense.

Where two complaints were filed charging the identical offense based on the same acts, the only difference being that the alleged location of the offense charged in the first complaint extended both north and south of Carey while in the second complaint the location of the offense was charged as being south of Carey, the location charged in the first complaint includes the location alleged in the

second complaint, therefore a conviction or acquittal of the offense charged in the first complaint would be a bar to a prosecution under the second complaint. *State v. Barter*, 80 Idaho 552, 335 P.2d 887 (1959).

In determining whether a subsequent charge involves the "same offense" as a previously dismissed charge, the court generally applies a "same evidence" or a "same transaction" test. The first approach focuses on whether the same evidence is required to support a conviction for each offense charged; the "same transaction" test focuses upon the behavior of the defendant that led to the prosecution. *State v. Barlow's, Inc.*, 111 Idaho 958, 729 P.2d 433 (Ct. App. 1986).

CHAPTER 36

PROCEEDINGS AGAINST CORPORATIONS

SECTION.

19-3601. Issuance of summons.

19-3602. Form of summons.

19-3603. Service of summons.

19-3604. Examination of charge.

SECTION.

19-3605. Certificate of magistrate.

19-3606. Investigation by grand jury.

19-3607. Appearance and plea.

19-3608. Collection of fine.

19-3601. Issuance of summons. — Upon an information or presentment against a corporation, the magistrate must issue a summons signed by him, with his name of office, requiring the corporation to appear before him at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons. [1875, p. 363, § 583; R.S., R.C., & C.L., § 8222; C.S., § 9182; I.C.A., § 19-3501.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Warrant, summons, I.C.R. 4.

Collateral References. 18B Am. Jur. 2d, Corporations, §§ 1893, 1894, 2134 — 2145.

Maintainability of criminal proceeding against dissolved corporation. 40 A.L.R.2d 1396.

Criminal liability of corporation for extor-

tion, false pretenses or similar offenses. 49 A.L.R.3d 820.

Criminal liability of corporation for bribery or conspiracy to bribe public official. 52 A.L.R.3d 1274.

Corporation's liability to criminal prosecution as affected by punishment for penalty imposed. 80 A.L.R.3d 1220.

Corporation's criminal liability for homicide. 45 A.L.R.4th 1021.

Propriety and effect of corporation's appearance pro se through agent who is not attorney. 8 A.L.R.5th 653.

19-3602. Form of summons. — The summons must be substantially in the following form:

County of (as the case may be):

The state of Idaho to the (naming the corporation):

You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you upon the information of A.B. (or the presentment of the grand jury of the county, as the case may be), for (designating the offense generally).

Dated at the city or precinct of, this day of,

G.H., Justice of the Peace.

(Or as the case may be.)

[Cr. Prac. 1864, § 584; R.S., R.C., & C.L., § 8223; C.S., § 9183; I.C.A., § 19-3502; am. 2002, ch. 32, § 7, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

The words enclosed in parentheses so appeared in the law as enacted.

Sections 6 and 8 of S.L. 2002, ch. 32 are compiled as §§ 19-3006 and 19-3903, respectively.

19-3603. Service of summons. — The summons must be served at least five (5) days before the day of appearance fixed therein, by delivering a copy thereof and showing the original to the president or other head of the corporation, or to the secretary, cashier or managing agent thereof. [1875, p. 363, § 585; R.S., R.C., & C.L., § 8224; C.S., § 9184; I.C.A., § 19-3503.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3604. Examination of charge. — At the appointed time in the summons the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable. [1875, p. 363, § 586; R.S., R.C., & C.L., § 8225; C.S., § 9185; I.C.A., § 19-3504.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Preliminary hearings, I.C.R. 5.1, 5.2.

Cited in: Davidson v. State, 92 Idaho 104, 437 P.2d 620 (1968).

19-3605. Certificate of magistrate. — After hearing the proofs, the magistrate must certify upon the deposition, either that there is or is not sufficient cause to believe the corporation guilty of the offense charged, and must return the deposition and certificate to the clerk of the district court of the county. [1875, p. 363, § 587; R.S., R.C., & C.L., § 8226; C.S., § 8196; I.C.A., § 19-3505.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-3606. Investigation by grand jury. — If the magistrate returns a certificate that there is sufficient cause to believe the corporation guilty of the offense charged, the grand jury may proceed thereon as in case of a

natural person held to answer. [1875, p. 363, § 588; R.S., R.C., & C.L., § 8227; C.S., § 9187; I.C.A., § 19-3506.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Grand jury, I.C.R. 6.1 to 6.9.
Powers and duties of grand jury, § 19-1101 et seq.
Indictment by grand jury, §§ 19-1401 — 19-1406.

19-3607. Appearance and plea. — If an indictment is found, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases. [1875, p. 363, § 589; R.S., R.C., & C.L., § 8228; C.S., § 9188; I.C.A., § 19-3507.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Initial appearance before magistrate, I.C.R. 5.

19-3608. Collection of fine. — When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action. [1875, p. 363, § 590; R.S., R.C., & C.L., § 8229; C.S., § 9189; I.C.A., § 19-3508.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Dispositions of fines, § 19-4705.
Execution in civil actions, general provisions, §§ 11-101 — 11-107.

Levy and sale under execution, §§ 11-301 — 11-313.

Property subject to execution, §§ 11-201 — 11-204.

CHAPTER 37

ERRORS AND MISTAKES

SECTION.

19-3701. Defectively entitled affidavit valid.

19-3702. Immaterial errors disregarded.

19-3701. Defectively entitled affidavit valid. — It is not necessary to entitle an affidavit or deposition in the action, whether taken before or after indictment, or upon an appeal; but if made without a title, or with an erroneous title, it is as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the proceeding, indictment or appeal in which it is made. [Cr. Prac. 1864, § 587; R.S., R.C., & C.L., § 8234; C.S., § 9190; I.C.A., § 19-3601.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Harmless error, I.C.R. 52.

19-3702. Immaterial errors disregarded. — Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right. [Cr. Prac. 1864, § 588; R.S., R.C., & C.L., § 8236; C.S., § 9191; I.C.A., § 19-3602.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Formal defects in indictments disregarded, § 19-1418.

Cited in: State v. Reed, 3 Idaho 754, 35 P. 706 (1894); In re Dowling, 4 Idaho 715, 43 P. 871 (1896); In re Marshall, 6 Idaho 516, 56 P. 470 (1899); State v. Poynter, 34 Idaho 504, 205 P. 561, 208 P. 871 (1921); State v. Cosgrove, 36 Idaho 278, 210 P. 393 (1922); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); Petersen v. Swanson, 51 Idaho 49, 1 P.2d 630 (1931); State v. Ward, 51 Idaho 68, 1 P.2d 620 (1931); State v. Farnsworth, 51 Idaho 768, 10 P.2d 295 (1932); State v. Orr, 53 Idaho 452, 24 P.2d 679 (1933); State v. Kenworthy, 68 Idaho 312, 193 P.2d 838 (1948); State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); State v. Burris, 80 Idaho 395, 331 P.2d 265 (1958); State v. Puckett, 88 Idaho 546, 401 P.2d 784 (1965); State v. Grady, 89 Idaho 204, 404 P.2d 347 (1965); State v. Ellis, 99 Idaho 606, 586 P.2d 1050 (1978); State v. McNary, 100 Idaho 244, 596 P.2d 417 (1979).

ANALYSIS

Application.
Criminal complaints.
Cure of defects.
Erroneous instructions.
Failure to give requested instruction.
Harmless error.
Improper opinion testimony.
Indigent or information.
Mistake of judge.
Prejudicial error.
Purpose of section.

Application.

This section applies to the rejection and admission of defendant's evidence which is not prejudicial to the defendant's rights. State v. Tisdell, 94 Idaho 329, 487 P.2d 692 (1971).

Criminal Complaints.

Merely having different or incorrect case numbers on a complaint or pleadings as a

result of either a clerical or typographical error, or use of a number from a previously dismissed case on an amended complaint, is not sufficient cause to invalidate the complaint; this is particularly true where there is only one event giving rise to the charges contained in all pleadings. State v. Bacon, 117 Idaho 679, 791 P.2d 429 (1990).

Cure of Defects.

Where information charges more than one offense, such defect is cured by state's election. State v. McBride, 33 Idaho 124, 190 P. 247 (1920), appeal dismissed, 258 U.S. 607, 42 S. Ct. 314, 66 L. Ed. 787 (1922).

Erroneous Instructions.

If the instructions taken as a whole are substantially correct, and jury could not have been misled to the prejudice of defendant, the giving of erroneous instructions is not ground for reversal. State v. Marren, 17 Idaho 766, 107 P. 993 (1910); State v. Silva, 21 Idaho 247, 120 P. 835 (1912).

An instruction that evidence is classified as direct or positive evidence and as circumstantial evidence should not have been given in a case in which the record contained no direct or positive evidence of defendant's guilt, but the error in giving such an instruction was harmless where it contained explicit definitions of the two classes of evidence and jury could, therefore, readily determine that there was no direct or positive evidence. State v. Darrah, 92 Idaho 25, 435 P.2d 914 (1968).

Failure to Give Requested Instruction.

Failure to give defendant's requested instruction regarding "absence of motive" was not prejudicial error in a prosecution for murder in which there was testimony offered by the prosecution concerning defendant's motive. State v. Radabaugh, 93 Idaho 727, 471 P.2d 582 (1970).

Harmless Error.

The following errors have been held harmless and disregarded:

Giving of a recognizance to people of the territory instead of to people of the United States in the territory. People v. Meyers, 1 Idaho 355 (1887).

Technical defects in indictments. *Territory v. Anderson*, 2 Idaho (Hasb.) 573, 21 P. 417 (1889); *Bonney v. State*, 3 Idaho 288, 29 P. 185 (1892); *State v. Ellington*, 4 Idaho 529, 43 P. 60 (1897); *State v. Alcorn*, 7 Idaho 599, 64 P. 1014, 97 Am. St. R. 252 (1901); *State v. Shuff*, 9 Idaho 115, 72 P. 664 (1903); *State v. Mickey*, 27 Idaho 626, 150 P. 39 (1915).

Failure of clerk to read indictment and state the plea to jury. *People v. Ah Hop*, 1 Idaho 698 (1890). But see *contra* cases cited in note to § 19-2101.

Errors which are not shown to have damaged accused. *Territory v. Neilson*, 2 Idaho (Hasb.) 614, 23 P. 537 (1890).

Failure of committing magistrate to indorse the order of commitment on the depositions. *State v. Clark*, 4 Idaho 7, 35 P. 710 (1894).

Informal verdict finding defendant "guilty of being vagrant." *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894).

Error in permitting questions, answers to which were harmless. *State v. Larkins*, 5 Idaho 200, 47 P. 945 (1897), overruled on other grounds, *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *State v. Levy*, 9 Idaho 483, 75 P. 227 (1904); *State v. Gruber*, 19 Idaho 692, 115 P. 1 (1911).

Error in sustaining a challenge of state to juror where defendant had not exhausted his peremptory challenges. *State v. McGraw*, 6 Idaho 635, 59 P. 178 (1899); *State v. Corcoran*, 7 Idaho 220, 61 P. 1034 (1900).

Variance between an information for larceny in alleging property in B and proof showing property in the firm of B & J. *State v. Ireland*, 9 Idaho 686, 75 P. 257 (1904).

Bringing in of separate verdicts against defendants jointly charged and tried. *State v. Cotterel*, 12 Idaho 572, 86 P. 527 (1906).

An instruction to acquit if jury has a reasonable and "abiding" doubt of defendant's guilt. *State v. Neil*, 13 Idaho 539, 90 P. 860, 91 P. 318 (1907).

Absence of trial judge on view of premises by jury. *State v. Moon*, 20 Idaho 202, 117 P. 757, 1913A Ann. Cas. 724 (1911).

Refusal of continuance where no showing is made that such refusal will result in actual prejudice. *State v. Allen*, 20 Idaho 263, 117 P. 849 (1911).

Misspelling of name of juror in summons for jury duty. *State v. McLennan*, 40 Idaho 286, 231 P. 718 (1925).

Allowing question as to exhibit in case where it had not previously been offered in evidence or identified. *State v. McLaughlin*, 42 Idaho 219, 245 P. 77 (1926).

Failure of trial court to indorse each of state's requested instructions. *State v. George*, 44 Idaho 173, 258 P. 551, cert. denied, 275 U.S. 544, 48 S. Ct. 83, 72 L. Ed. 417 (1927).

Omission of word "feloniously" in indict-

ment for larceny, where charge is clearly understandable by person of common intelligence. *State v. Basinger*, 46 Idaho 775, 271 P. 325 (1928).

Defendant's rights were not prejudiced by error of the jury in finding him guilty "as charged in the information" instead of guilty "as charged in the amended information." *State v. Carpenter*, 92 Idaho 12, 435 P.2d 789 (1967).

It was error to refuse to allow the defense attorney to examine notes used by a state's witness to refresh his memory, but where the verdict of guilty was overwhelmingly supported by the evidence and all relevant and material facts testified to by the witness were corroborated substantially by other competent witnesses, such error was technical, harmless and not reversible. *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968).

Where error alleged on appeal was that trial court recalled jury after five days to correct verdict, and that he failed to swear jury, the procedure followed by the court was erroneous, however it is not apparent how defendant was prejudiced or any substantial right of his infringed. *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969).

Trial court's permitting introduction of testimony from defense witness to the effect that defendant had been known to the witness in penitentiary over objection where defendant had not taken the stand during the trial was error, but where record indicated strong evidence of defendant's participation in the crime, the error was not sufficiently prejudicial to warrant reversal and new trial. *State v. Tisdell*, 94 Idaho 329, 487 P.2d 692 (1971).

In a rape prosecution, where the prosecutor's questioning of a detective concerning burglaries which occurred on the morning of the alleged rape did not amount to a calculated effort to create an inference in the minds of the jurors that the defendant was suspected of committing additional crimes, the failure of the trial court to administer a cautionary instruction to the jury with regard to the detective's testimony was not reversible error. *State v. Kraft*, 96 Idaho 901, 539 P.2d 254 (1975), appeal dismissed, 99 Idaho 214, 579 P.2d 1197 (1978).

Witnesses' identification of a defendant in a photographic lineup, when it is known that the defendant's photograph was pulled from the files of another investigation, is not prejudicial if the overall evidence indicates that the witnesses neither viewed the photograph nor identified it within each other's presence. *State v. Morris*, 97 Idaho 420, 546 P.2d 375 (1976).

So long as the probable cause determination actually has been made by a neutral and detached magistrate, no substantial right of the accused is affected by the identity of the

magistrate who signs the commitment order; moreover, if an accused receives a fair trial, errors connected with the preliminary hearing will afford no basis for disturbing the judgment of conviction. *State v. Garza*, 109 Idaho 40, 704 P.2d 944 (Ct. App. 1985).

When the asserted error pertains to material admitted at trial, the test of whether an error is harmless is whether it appears from the record beyond a reasonable doubt that the jury would have reached the same result had the material not been admitted; when the error concerns material omitted at trial, the test is whether there is a reasonable possibility that the lack of the omitted material might have contributed to the conviction. *State v. Scroggie*, 110 Idaho 103, 714 P.2d 72 (Ct. App. 1986).

Although the better practice would have been for the prosecutor to give defendant a complete list of all known witnesses conforming literally to the requirements of ICR 16(b)(6), where the aggregate disclosure was not done in this manner, but it did include identity of the witness in question, and because defendant did not demonstrate any prejudice, substantial compliance with the rule was sufficient. *State v. Phillips*, 117 Idaho 23, 784 P.2d 353 (Ct. App. 1989).

Improper Opinion Testimony.

Even assuming that the admission of the opinion testimony of witness that two people were involved in burglary was erroneous, no sufficient prejudice resulted thereby so as to require reversal, and the court's gratuitous comment that the jury could give the testimony what weight they felt it deserved was no more than a premature statement of the law that credibility is for the jury. In the context in which given, it more likely would have had a denigrating effect on the opinion testimony and did not constitute reversible error. *State v. Pratt*, 103 Idaho 816, 654 P.2d 909 (1982).

Indictment or Information.

An information charging that defendant committed perjury in testimony before the district court is not invalid for failure to allege the name of the officer before whom the oath was taken nor his authority. *State v. Martinez*, 89 Idaho 232, 404 P.2d 573 (1965).

Mistake of Judge.

New trial should never be granted, notwithstanding some mistake or even misdirection by judge, provided revising court is satisfied that justice has been done and that upon the evidence no other verdict could properly have been found. *State v. Marren*, 17 Idaho 766, 107 P. 993 (1910); *State v. Dong Sing*, 35 Idaho 616, 208 P. 860 (1922).

A defendant was not to be prejudiced by delay in filing instructions or a failure to file them, where he was able to have them reviewed on the record presented. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, 57 Idaho 248, 65 P.2d 156 (1937).

Prejudicial Error.

Cross-examination of accused by judge tending to show his guilt is reversible error. *State v. Freitag*, 53 Idaho 726, 27 P.2d 68 (1933).

Purpose of Section.

Purpose of this section is to admonish courts in criminal procedure that errors or mistakes which do not tend to prejudice substantial rights of defendant should be disregarded. *State v. Hunsaker*, 37 Idaho 413, 216 P. 721 (1923); *State v. McLennan*, 40 Idaho 286, 231 P. 718 (1925).

This section was enacted for express purpose of avoiding many miscarriages of justice occasioned by strict adherence to old rule of presumption that any error is prejudicial. *State v. Jurko*, 42 Idaho 319, 245 P. 685 (1925).

This section and § 19-2819 (repealed) are recognized as admonitions against reliance on technical errors or defects as the basis for reversals of judgments in criminal actions yet they cannot be considered as authorizing the trial court to disregard the usual and ordinary procedure in the trial of a cause and adopt a new and entirely different manner from that provided by statute. *State v. Carringer*, 84 Idaho 32, 367 P.2d 584 (1961).

Section 19-2819 (repealed) and this section are recognized as admonitions against reliance upon technical errors as the basis for reversal of judgments. *State v. Stevens*, 93 Idaho 48, 454 P.2d 945 (1969).

CHAPTER 38

DISPOSAL OF PROPERTY ILLEGALLY HELD BY DEFENDANT

SECTION.

- 19-3801. Disposal of stolen property.
- 19-3802. Order for delivery.
- 19-3803. Delivery to owner.
- 19-3804. Court may order delivery.
- 19-3805. Delivery to county treasurer.

SECTION.

- 19-3806. Receipt for property taken from defendant.
- 19-3807. Confiscation of firearms, explosives or contraband upon conviction.

19-3801. Disposal of stolen property. — When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by the next section to direct the disposal thereof. [Cr. Prac. 1864, § 589; R.S., R.C., & C.L., § 8238; C.S., § 9192; I.C.A., § 19-3701.]

Cross ref. Reclaiming exhibits, documents or property, I.C.R. 41.1.

Sec. to sec. ref. Sections 19-3801 — 19-3806 are referred to in § 19-4414.

Cited in: *Gissel v. State*, 111 Idaho 725, 727 P.2d 1153 (1986).

Conversion by Sheriff.

Sheriff's possession of stolen property would not constitute conversion until he refused to return property after magistrate's order. *Haffner v. United States Fid. & Guar. Co.*, 49 Idaho 451, 288 P. 1071 (1930).

19-3802. Order for delivery. — On satisfactory proof of the ownership of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling it, must order it to be delivered to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property. [Cr. Prac. 1864, § 590; R.S., R.C., & C.L., § 8239; C.S., § 9193; I.C.A., § 19-3702.]

19-3803. Delivery to owner. — If property stolen or embezzled comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. [Cr. Prac. 1864, § 591; R.S., R.C., & C.L., § 8240; C.S., § 9194; I.C.A., § 19-3703.]

19-3804. Court may order delivery. — If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner. [Cr. Prac. 1864, § 592; R.S., R.C., & C.L., § 8241; C.S., § 9195; I.C.A., § 19-3704.]

19-3805. Delivery to county treasurer. — If the property stolen or embezzled is not claimed by the owner before the expiration of six (6) months from the conviction of a person for stealing or embezzling it, the magistrate or other officer having it in custody must, on the payment of the necessary expenses incurred in its preservation, deliver it to the county treasurer, by whom it must be sold and the proceeds paid into the county treasury. [Cr. Prac. 1864, § 593; R.S., R.C., & C.L., § 8242; C.S., § 9196; I.C.A., § 19-3705.]

Cited in: *Gissel v. State*, 111 Idaho 725, 727 P.2d 1153 (1986).

19-3806. Receipt for property taken from defendant. — When money or other property is taken from a defendant, arrested upon a charge of a public offense, the officer taking it must, at the time, give duplicate receipts therefor, specifying particularly the amount of money or the kind of property taken; one of which receipts he must deliver to the defendant, and

the other of which he must forthwith file with the clerk of the court to which the depositions and statement are to be sent. [Cr. Prac. 1864, § 594; R.S., R.C., & C.L., § 8243; C.S., § 9197; I.C.A., § 19-3706.]

19-3807. Confiscation of firearms, explosives or contraband upon conviction. — (1) At the time any person is convicted of a felony in any court of the state of Idaho, firearms, ammunition, bombs, nitroglycerin, or explosives of any nature, including illegal fireworks, or any other deadly weapons or contraband of any kind found in his possession or under his control at the time of his arrest may be confiscated and disposed of in accordance with the order of the court before which such person was tried. “Contraband” as used in this section shall mean any personal property, possession of which is illegal under the laws of the state of Idaho or the United States.

(2) Notice of confiscation proceedings shall be given to each owner or person who is believed to have an interest in the property in question by serving a copy of the state’s motion describing the property with a notice of hearing on the motion as follows:

(a) Upon each owner or interested party whose name and address is known, by mailing a copy of the state’s motion to confiscate and notice of hearing by certified mail to the owner or party’s last known address, or to his attorney;

(b) Upon all other owners or interested parties whose addresses are unknown, but who are believed to have an interest in the property, by publishing one (1) notice in a newspaper of general circulation in the county where the property was seized.

(3) Within twenty (20) days after the mailing or publication of the notice, the owner of the property in question and any other interested party may file with the court a claim to the property described in the motion to confiscate.

(4) If one or more claims are filed, the confiscation proceeding shall be set for hearing at least thirty (30) days after the last timely claim is filed.

(5) At the confiscation hearing any person who has filed a timely claim may show by competent evidence that the property in question was not in the possession or control of the defendant at the time of his arrest or that the owner is innocent of any involvement in the acts which led to the defendant’s arrest, in which case the court may return the property to the owner or interested person or order any other disposition which is appropriate under the circumstances.

(6) If no claim has been filed within twenty (20) days after the state’s motion to confiscate and notice of hearing has been mailed or published, the court shall hear evidence concerning the defendant’s possession and control of the property in question at the time of arrest. If it finds that the property was in the defendant’s possession and control at the time of arrest or, if pursuant to subsection 5 above, the court rejects any claim which has been filed, the court may direct the delivery to the law enforcement agency which apprehended the defendant, for its use or for any other disposition in its discretion. [1941, ch. 53, § 1, p. 112; am. 1984, ch. 177, § 1, p. 423.]

ANALYSIS

Constitutionality.

— Standing to raise issue.

Delay.

Procedural due process.

Purpose.

Constitutionality.

This section is not unconstitutionally vague or overbroad, because it uniformly applies to all persons convicted of a felony who are found in possession or control of a firearm at the time of their arrest. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

— Standing to Raise Issue.

Although defendant's friend had an interest in shotgun and should have been given notice of confiscation hearing, defendant was not aggrieved by the failure to notify him and therefore had no standing to challenge the constitutionality of this section on this ground. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Delay.

Where confiscation proceeding was brought approximately six months after defendant was convicted and sentenced and defendant's only assertion of prejudice was the fact that

he would be denied the loss of a valuable collector's item which he had given to a friend, the six-month time period was not unreasonable and the district court did not err in granting the state's motion to confiscate the murder weapon. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Procedural Due Process.

Where the state's motion for confiscation of shotgun provided notice, a hearing was held prior to forfeiture at which defendant was represented by counsel, defendant's counsel argued against the motion and had the opportunity to submit a brief on the subject, and the court issued a written opinion setting forth the reasons for granting the motion, procedural due process requirements were met. *State v. Money*, 109 Idaho 757, 710 P.2d 667 (Ct. App. 1985), cert. denied, 116 Idaho 466, 776 P.2d 828 (1986).

Purpose.

This section is the statutory vehicle which provides for the confiscation and forfeiture of firearms upon the conviction of a felony if the firearms were in the possession or control of the defendant at the time of the defendant's arrest. *Richardson v. One 1972 GMC Pickup*, 121 Idaho 599, 826 P.2d 1311 (1992).

CHAPTER 39

PROCEEDINGS IN MAGISTRATE'S DIVISION OF THE DISTRICT COURT

SECTION.

19-3901. Complaint or citation.

19-3901A. Failure to obey citation for misdemeanor.

19-3902. Correction of defective complaint.

19-3903. Issuance and form of warrant.

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19-3905. Plea — Examination on plea of guilty.

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19-3921. Proceedings on plea of guilty.

19-3922. [Repealed.]

SECTION.

19-3923. Acquittal — Costs of malicious prosecution.

19-3924. Malicious prosecution — Judgment against prosecutor.

19-3925. Time for judgment.

19-3926. Motions prior to judgment.

19-3927. Grounds for new trial.

19-3928. Grounds for arrest of judgment.

19-3929. Pronouncement and entry of judgment.

19-3930. Discharge of defendant.

19-3931. Warrant for execution of judgment.

19-3932. Imprisonment pending payment of fine.

19-3933. Discharge upon payment of fine.

19-3934. Admittance to bail.

19-3935. Subpoenas for witnesses.

19-3936. Entitling affidavits.

19-3937, 19-3938. Appeals to district court — Notice. [Repealed.]

19-3939. Undertaking for appearance of witnesses.

19-3940. Transmission of papers.

19-3941. Bail pending appeal.

19-3942. Trial on appeal.

19-3943. Costs to abide event.

SECTION.

19-3944. Judgment against sureties for costs.
19-3945. Jurors and witnesses — Fees and
mileage — Application for sub-
poenas.

SECTION.

19-3946. Affidavit as to miles traveled.

19-3901. Complaint or citation. — All proceedings and actions before the magistrates division of the district court for a public offense of which such court has jurisdiction, must be commenced by complaint setting forth the offense charged, with such particulars of time, place, person and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. A complaint for a misdemeanor must be sworn to before a magistrate or judge. A complaint for an infraction may be an unsworn complaint signed by a law enforcement officer. Provided, however, as to any misdemeanor or infraction triable by a magistrate, a law enforcement officer may, in lieu of making a written complaint, issue to the defendant a uniform citation containing a complaint and a summons to appear in a form and in the manner prescribed by rule of the supreme court. The complaint in the uniform citation shall contain a certification by the law enforcement officer to the effect that he certifies that he has reasonable grounds to believe, and does believe, that the person cited committed the offense contrary to law. The citation shall be served upon the defendant by obtaining his written promise to appear in court at a time certain or by physically delivering the citation to the defendant. The citation shall be processed in the courts as prescribed by rule of the supreme court. If the defendant fails to appear on a misdemeanor citation at the time indicated in the summons, the defendant may be prosecuted for the misdemeanor offense of failure to appear under section 19-3901A, Idaho Code. [CR. Prac. 1864, § 595; R.S., R.C., & C.L., § 8280; C.S., § 9227; I.C.A., § 19-4001; am. 1967, ch. 152, § 1, p. 342; am. 1971, ch. 117, § 1, p. 400; am. 1979, ch. 165, § 1, p. 509; am. 1982, ch. 353, § 9, p. 874; am. 1983, ch. 25, § 1, p. 66.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 2 of S.L. 1979, ch. 165 contained a repeal.

Section 8 of S.L. 1982, ch. 353 is compiled as § 19-1902.

Section 2 of S.L. 1967, ch. 152 declared an emergency. Approved March 20, 1967.

Section 2 of S.L. 1971, ch. 117 declared an

emergency. Approved March 16, 1971.

Cross ref. Jurisdiction of magistrates, I.C.R. 2.2.

Sec. to sec. ref. This section is referred to in §§ 49-1409 and 49-1410.

Cited in: State v. Iverson, 79 Idaho 25, 310 P.2d 803 (1957); In re Martz, 83 Idaho 72, 357 P.2d 940 (1960); State v. Brown, — Idaho —, 85 P.3d 683 (Ct. App. 2004).

ANALYSIS

Amendment of complaint.

Application of section.

Oath.

Law enforcement officer.

— County building officials.

— Defined.

Probable cause.

Sufficiency of complaint.

Amendment of Complaint.

Where the state did not plead the manner in which the defendant operated his motor

vehicle which it alleged constituted an offense under the reckless driving statute and there is nothing in the record to show that the prosecuting attorney could not have amended his complaint sufficiently to satisfy the requirements of particularity the trial court should have permitted an amendment of the complaint. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

Application of Section.

The pleading requirements of §§ 19-1409 — 19-1411 are in conflict with this section. The first three apply to indictments and informations before the district court, whereas the last statute is applicable to criminal complaints in probate courts, justice of the peace and police courts (now magistrates division). The language of the statutes, although not identical, has the same substantive requirements. A conviction of an offense pleaded with particularity required of the latter, could be pleaded as a bar to another charge for the same offense. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

A criminal complaint before the magistrate division may be phrased generally in the words of the statute or ordinance allegedly violated if the complaint meets the factual requirements relating to the preparation of an adequate defense and provides a res judicata effect. *State v. Griffith*, 97 Idaho 52, 539 P.2d 604 (1975).

Oath.

Testimony of deputy that after he had signed the complaint the judge asked him "if that was the true facts as I knew it" and in answering that it was he felt in conscience he had taken on the obligation of the oath was a sufficient compliance with the statute even though there was no formal administration of the oath, the deputy not having raised his hand or taken a verbal oath to the truth of the statements made in the complaint. *State v. Parker*, 81 Idaho 51, 336 P.2d 318 (1959).

Law Enforcement Officer.

—County Building Officials.

County building officials qualified as "law enforcement officers" within the meaning of this section and were authorized to issue a citation for alleged violations for the county building code. *State v. Gage*, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993).

—Defined.

Absent a definition of "law enforcement officer" in Idaho Code Title 19, the definition contained in M.C.R. 2(g) applies because it defines the term "peace officer" which is used in M.C.R. 5(a), which governs the use of citations. The definition of "peace officer" in M.C.R. 2(g) includes officials "authorized to enforce municipal, county, or state laws."

State v. Gage, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993).

Probable Cause.

Although the deputy had no authority to make a warrantless arrest for misdemeanor offenses committed outside his presence, he was authorized to issue a citation as provided in this section where he had probable cause based on a citizen's eyewitness account, that the defendant had violated one or more misdemeanor statutes regulating the operation of boats. *State v. Simpson*, 112 Idaho 644, 734 P.2d 669 (Ct. App.), cert. denied, 112 Idaho 948, 738 P.2d 94 (1987).

Sufficiency of Complaint.

Where complaint charges offense defined in statute in plain and concise language, it is all that can be required. *State v. Ashby*, 40 Idaho 1, 230 P. 1013 (1924).

A prosecution is commenced by filing a complaint under oath setting forth the offense charged with such particulars as will enable the defendant to understand the character thereof. *State v. Ashby*, 40 Idaho 1, 230 P. 1013 (1924).

Complaint charging crime of "acting as a broker" in the language of the statute and specifying the particular transaction minutely is sufficient compliance with this section. *State v. Johnson*, 54 Idaho 431, 32 P.2d 1023 (1934).

This section governs complaints in probate and justice courts (now magistrates division) and they are not to be tested by §§ 19-1409 to 19-1411, governing indictments. *State v. Griffith*, 55 Idaho 60, 37 P.2d 402 (1934).

A complaint alleging that, on a certain date, the accused wilfully and unlawfully used force and violence upon the person of another is sufficient to charge the misdemeanor of battery. *State v. Griffith*, 55 Idaho 60, 37 P.2d 402 (1934).

The facts constituting the offense must be clearly and distinctly stated and it is not sufficient if the facts appear by inference and argument. *State v. Wilding*, 57 Idaho 149, 63 P.2d 659 (1936).

A complaint charging a misdemeanor need not set forth facts constituting an offense with all the particularity required in indictments or informations. *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

A complaint alleging that defendant made and signed a claim for partial unemployment benefits under the unemployment compensation law on a specified date at a named city, and defrauded the state of a specific sum by inducing the Unemployment Compensation Division of the Industrial Accident Board to pay such claim, sufficiently charged the offense of obtaining money under false pretenses, so that a conviction thereunder could be pleaded as a bar to another charge of the

same offense. *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

A complaint alleging that defendant, in violation of a city ordinance, maintained upon the waters of a lake a houseboat used as a residence, and setting forth such particulars as to time, place, persons and property as to enable defendant to understand the character of the offense complained of, was sufficient as against a claim that it stated merely conclusions. *State v. Finney*, 65 Idaho 630, 150 P.2d 130 (1944).

The complaint charged defendant with reckless driving in the language of the statute. There was nothing in the complaint to indicate what acts of the defendant constituted alleged reckless driving. In view of this deficiency, the order of the court sustaining the demurrer was correct. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

A complaint that defendant at a specified time and place "wilfully, knowingly, intention-

ally, unlawfully, carelessly and heedlessly, and without due caution and circumspection, and at a speed and in a manner so as to endanger persons and property" drove a specified motor vehicle was sufficient to charge the offense of reckless driving. *State v. Pruett*, 91 Idaho 537, 428 P.2d 43 (1967).

Where criminal complaint described stolen cow as "one horned, brindle, heifer cow, being the property of Jeannine Martin" and the time as "between the middle of October, 1974; and the end of February, 1975", the complaint was legally sufficient under I.C.R. 3 and this section, since it is not necessary for the complaint to contain a formal or detailed description of the offense charged and defendant was given a fair opportunity to know the general character and outline of the offense charged. *State v. Owens*, 101 Idaho 632, 619 P.2d 787 (1979), overruled on other grounds, *State v. Pierce*, 107 Idaho 96, 685 P.2d 837 (Ct. App. 1984).

19-3901A. Failure to obey citation for misdemeanor. — (a) It shall be unlawful for any person to fail to appear in court at the time promised on a misdemeanor citation or to fail to appear at the time indicated on a misdemeanor citation served upon the defendant, regardless of the disposition of the charge upon which such citation was originally issued.

(b) The duty to appear in court at the time indicated in a misdemeanor citation may be complied with by an appearance by counsel in the manner prescribed by rule of the supreme court.

(c) Violation of the provisions of this section shall be a misdemeanor. [I.C., § 19-3901A, as added by 1983, ch. 25, § 3, p. 66.]

Compiler's notes. Former § 19-3901A which comprised I.C., § 19-3901A as added by 1981, ch. 225, § 2, p. 442; am. 1982, ch. 353, § 10, p. 874 and which was to take effect July 1, 1983 was repealed by S.L. 1983, ch. 25, § 2 effective July 1, 1983.

Section 4 of S.L. 1983, ch. 25 was compiled as former § 49-313, which was amended and redesignated as § 49-310 by S.L. 1988, ch. 265.

Section 21 of S.L. 1983, ch. 25 provided that the act should take effect on and after July 1, 1983.

Sec. to sec. ref. This section is referred to in § 19-3901.

Cited in: *State v. Gage*, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993).

19-3902. Correction of defective complaint. — Whenever it shall appear to the prosecuting attorney of any county of this state that any criminal complaint filed in any justice or probate court is defective or void, the said prosecuting attorney shall have the right to substitute a new complaint, and the defendant or defendants shall not be considered to have been placed in jeopardy by any proceedings previous to the filing of the said new complaint: provided, that said prosecuting attorney shall file said complaint before the case for the prosecution has been closed. [1907, p. 110, § 1; reen. R.C. & C.L., § 8280a; C.S., § 9228; I.C.A., § 19-4002.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the

Magistrates Division of the District Court, effective January 11, 1971. However, an order

of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

ANALYSIS

Amendment injecting new issues.
Double jeopardy.

Amendment Injecting New Issues.

Complaint charging defendant, an Indian, with the crime of illegal possession of a deer carcass during closed season, could not be amended in district court on appeal from

probate court (now magistrates division) by alleging the taking and killing of the deer on privately owned lands, since the amendment injected new issues which were not tried in probate court. *State v. Powauke*, 78 Idaho 257, 300 P.2d 488 (1956).

Double Jeopardy.

Defendant's argument that her prior conviction pursuant to her guilty plea, vacated on appeal because the indictment was jurisdictionally defective for failing to allege an essential element of the offense, triggered double jeopardy protection was overruled, and defendant's conviction of felony injury to a child was affirmed because a defendant who procured a judgment against her upon an indictment to be set aside could be tried anew upon the same or upon another indictment for the same offense of which she had been convicted. Idaho Code § 19-1719 did not bar a second prosecution where an initial conviction was reversed on appeal due to a jurisdictional deficiency in the charging document, and Idaho Code § 19-3902 on its face did not purport to apply to the opening of a new criminal case after a conviction had been vacated on appeal. *State v. Byington*, — Idaho —, 81 P.3d 421 (Ct. App. 2003).

19-3903. Issuance and form of warrant. — If the probate judge or justice of the peace is satisfied therefrom that the offense complained of has been committed, he must issue a warrant of arrest, which must be substantially in the following form:

County of

The state of Idaho to any sheriff, constable, marshal or policeman, in this state:

Complaint, upon oath, having been this day made before me (justice of the peace or probate judge, as the case may be), by C.D., that the offense of (designating it generally), has been committed, and accusing E.F. thereof; you are therefore commanded forthwith to arrest the above named E.F. and bring him before me forthwith at (naming place).

Witness my hand at, this day of, (And if in probate court, seal of court.) A.B.

[Cr. Prac. 1864, § 597; R.S., R.C., & C.L., § 8281; C.S., § 9229; I.C.A., § 19-4003; am. 2002, ch. 32, § 8, p. 46.]

Compiler's notes. This section was made, a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously this section had been made a rule of procedure and practice for the courts of

Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as

the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Sections 7 and 9 of S.L. 2002, ch. 32 are compiled as §§ 19-3602 and 19-4309, respectively.

Cross ref. Sheriff's fees, § 31-3203.

19-3904. Docket and minutes. — A docket must be kept by the justice of the peace, or by the clerk of the probate court, in which must be entered each action and the proceedings of the court therein. [Cr. Prac. 1864, § 600; R.S., R.C., & C.L., § 8282; C.S., § 9230; I.C.A., § 19-4004.]

Compiler's notes. This section was made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, such rules were rescinded by Supreme Order of December 27, 1979, effective July 1, 1980. Now see Idaho Criminal Rules.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished

by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cited in: State v. Drury, 25 Idaho 787, 139 P. 1129 (1914).

Status of Records.

Records of a justice court are admissible as best evidence of proceedings had therein in criminal cases, of which a written record is made, as required by statute. State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940).

19-3905. Plea — Examination on plea of guilty. — The defendant may make the same plea as upon an indictment. His plea must be oral, and entered in the minutes. If the defendant plead guilty, the court may, before entering such plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed; and if it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail, to answer any indictment which may be found against him by the grand jury. [1875, p. 363, § 602; R.S., R.C., & C.L., § 8283; C.S., § 9231; I.C.A., § 19-4005.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1987 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cross ref. Examination and commitment, §§ 19-514, 19-801 et seq.

Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909); State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940).

19-3906. Proceedings after plea. — Upon a plea other than a plea of guilty, if the parties waive a trial by jury, and an adjournment or change of

venue is not granted, the court must proceed to try the case. [R.S., R.C., & C.L., § 8284; C.S., § 9232; I.C.A., § 19-4006.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1987 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cross ref. Waiver of trial by jury, § 19-3911.

Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909); Ex parte Dalton, 72 Idaho 451, 243 P.2d 594 (1952).

19-3907. Change of venue — Grounds and application. — If the action or proceeding is in a probate or justice's court, a change of the place of trial may be had:

1. When it appears from the affidavit of the defendant that he has reason to believe, and does believe that he can not have a fair and impartial trial before the probate judge or justice about to try the case, by reason of the prejudice or bias of such judge or justice, the cause must be transferred to any other justice of the county or the probate court thereof.

2. When in a justice's court it appears from affidavits that the defendants can not have a fair and impartial trial, by reason of the prejudice of the citizens of the precinct, the cause must be transferred to a justice of a precinct where the same prejudice does not exist, or to the probate court:

Provided, the defendant shall have served written notice upon the prosecuting attorney of his intention to apply for such change of venue, at least twenty-four hours before the time set for such trial; or if the defendant fail to give such notice, such change may only be granted upon the payment by the defendant of all accrued costs. [R.S., § 8285; am. 1907, p. 215, § 1; reen. R.C. & C.L., § 8285; C.S., § 9233; I.C.A., § 19-4007.]

Compiler's notes. This section was made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, such rules were rescinded by Supreme Order of December 27, 1979, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court pro-

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Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909).

19-3908. Change of venue — Proceedings. — When a change of the place of trial is ordered, the judge or justice must transmit to the justice

before whom the trial is to be had, all the original papers in the cause, with a certified copy of the minutes of all his proceedings; and upon receipt thereof, the justice to whom they are delivered must proceed with the trial in the same manner as if the proceeding or action had been originally commenced in his court. [R.S., R.C., & C.L., § 8286; C.S., § 9234; I.C.A., § 19-4008.]

Compiler's notes. This section was made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, such rules were rescinded by Supreme Order of December 27, 1979, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3909. Postponement of trial. — Before the commencement of a trial in any of the courts mentioned in this chapter, either party may, upon good cause shown, have a reasonable postponement thereof. [1875, p. 363, § 602; R.S., R.C., & C.L., § 8287; C.S., § 9235; I.C.A., § 19-4009.]

Compiler's notes. This rule was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1987. However a order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was re-

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Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

19-3910. Presence of defendant. — The defendant must be personally present before the trial can proceed. [Cr. Prac. 1864, § 599; R.S., R.C., & C.L., § 8288; C.S., § 9236; I.C.A., § 19-4010.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3911. Waiver of trial by jury. — A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket. The formation of the jury is provided for in chapter 1, of title 2. [R.S., R.C., & C.L., § 8289; C.S., § 9237; I.C.A., § 19-4011.]

Compiler's notes. This section was made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3912. Challenge to jurors. — The same challenges may be taken by either party to the panel of jurors, or to any individual juror, for cause, as on the trial of an indictment for a misdemeanor; but the challenges must in all cases be tried by the court; the defendant is entitled to four (4) peremptory challenges and the prosecution to four (4). [1875, p. 363, §§ 605, 607; R.S., R.C., & C.L., § 8290; C.S., § 9238; am. 1929, ch. 33, § 1, p. 36; I.C.A., § 19-4012.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 29, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cross ref. Challenges to jury, §§ 19-2001 — 19-2030.

19-3913. Oath of jurors. — The court must administer to the jury the following oath:

You do swear that you will well and truly try this issue between the state of Idaho and A. B., the defendant, and a true verdict render according to the evidence. [Cr. Prac. 1864, § 603; R.S., R.C., & C.L., § 8291; C.S., § 9239; I.C.A., § 19-4013.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge,"

"probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

19-3914. Conduct of jury. — After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be delivered in public and in the presence of the defendant. [Cr. Prac. 1864, § 604; R.S., R.C., & C.L., § 8292; C.S., § 9240; I.C.A., § 19-4014.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was re-

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19-3915. Court to decide questions of law. — The court must decide all questions of law which may arise in the course of the trial, but can give no charge to the jury. [Cr. Prac. 1864, § 605; R.S., R.C., & C.L., § 8293; C.S., § 9241; I.C.A., § 19-4015.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrate Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promul-

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19-3916. Retirement of jury. — After hearing the proofs and allegations, the jury may decide in court, or may retire for consideration. If they do not immediately agree, an officer must be sworn to the following effect:

You do swear that you will keep this jury together in some quiet and convenient place; that you will not permit any person to speak to them, nor speak to them yourself unless by order of the court, or to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed or when ordered by the court. [Cr. Prac. 1864, § 606; R.S., R.C., & C.L., § 8294; C.S., § 9242; I.C.A., § 19-4016.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Divi-

sion of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3917. Verdict. — The verdict of the jury must in all cases be general. When the jury have agreed on their verdict they must deliver it publicly to the court, who must enter it or cause it to be entered, in the minutes. [Cr. Prac. 1864, §§ 607, 608; R.S., R.C., & C.L., § 8295; C.S., § 9243; I.C.A., § 19-4017.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3918. Verdict against joint defendants. — When several defendants are tried together, if the jury can not agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree on which a judgment must be entered accordingly, and the case as to the rest may be tried by another jury. [Cr. Prac. 1864, § 609; R.S., R.C., & C.L., § 8296; C.S., § 9244; I.C.A., § 19-4018.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3919. Discharge of jury. — The jury cannot be discharged after the cause is submitted to them until they have agreed upon and rendered their verdict unless, for good cause the court sooner discharges them. [Cr. Prac. 1864, § 610; R.S., R.C., & C.L., § 8297; C.S., § 9245; I.C.A., § 19-4019.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Divi-

sion of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

19-3920. Retrial of defendant. — If the jury is discharged as provided in the last section, the court may proceed again to the trial in the same manner as upon the first trial, and so on until a verdict is rendered. [Cr. Prac. 1864, § 611; R.S., R.C., & C.L., § 8298; C.S., § 9246; I.C.A., § 19-4020.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3921. Proceedings on plea of guilty. — When the defendant pleads guilty, or is convicted either by the court or by a jury, the court must render judgment thereon of fine or imprisonment, or both, as the case may be: provided, however, it appearing to the court that it is a proper case, the court may, in its discretion, suspend the execution of judgment, and at such time, or any time during the period of sentence in a county jail, may put the defendant on probation on such terms and for such time as it may prescribe. The period of probation ordered by the court under this section under a conviction or plea of guilty for a misdemeanor, indictable or otherwise, may be for a period of not more than two (2) years. The court may withhold judgment on such terms and conditions as it deems necessary or expedient. [Cr. Prac. 1864, § 612; R.S., R.C., & C.L., § 8299; C.S., § 9247; I.C.A., § 19-4021; am. 1937, ch. 60, § 1, p. 82; am. 1949, ch. 145, § 1, p. 300; am. 1973, ch. 292, § 2, p. 615.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Section 1 of S.L. 1973, ch. 292 is compiled as § 19-2601.

Cited in: State v. Sedam, 62 Idaho 26, 107 P.2d 1062 (1940).

19-3922. Judgment of fine. [Repealed.]

Compiler's notes. Former § 19-3922, which comprised R.S., § 8300; am. 1899, p. 379, § 6; reen. R.C. & C.L., § 8300; C.S., § 9248; I.C.A., § 19-4022, was repealed by S.L. 1994, ch. 142, § 2, effective July 1, 1994.

19-3923. Acquittal — Costs of malicious prosecution. — When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking, with one (1) or more sureties, to pay the same within thirty (30) days after the trial. [Cr. Prac. 1864, § 614; R.S., R.C., & C.L., § 8301; C.S., § 9249; I.C.A., § 19-4023.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Proof.

In a malicious prosecution (civil), plaintiff must allege and prove (1) that there was a prosecution; (2) that it terminated in favor of plaintiff; (3) that defendants were prosecutors; (4) that they were actuated by malice; (5) that there was want of probable cause; (6) the amount of damages that plaintiff has sustained *Lowther v. Metzker*, 69 Idaho 115, 203 P.2d 604 (1949).

19-3924. Malicious prosecution — Judgment against prosecutor. — If the prosecutor does not pay the costs, or give security therefor, the court may enter judgment against him for the amount thereof, which may be enforced in all respects, in the same manner as a judgment rendered in a civil action. [Cr. Prac. 1864, § 615; R.S., R.C., & C.L., § 8302; C.S., § 9250; I.C.A., § 19-4024.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3925. Time for judgment. — After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or

acquittal, the court must appoint a time for rendering judgment, which must not be more than two (2) days nor less than six (6) hours after the verdict is rendered, and must hold the defendant to bail to appear for judgment, and in default of bail he must be committed. [Cr. Prac. 1864, § 617; R.S., R.C., & C.L., § 8303; C.S., § 9251; I.C.A., § 19-4025.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3926. Motions prior to judgment. — At any time before judgment defendant may move for a new trial or in arrest of judgment. [Cr. Prac. 1864, § 618; R.S., R.C., & C.L., § 8304; C.S., § 9252; I.C.A., § 19-4026.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909).

19-3927. Grounds for new trial. — A new trial may be granted in the following cases:

1. When the trial has been had in the absence of the defendant, unless he voluntarily absent himself, with full knowledge that a trial is being had.

2. When the jury has received any evidence out of court.

3. When the jury has separated without leave of the court, after having retired to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case.

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors.

5. When there has been error in the decision of the court, given on any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered, material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial; but when a motion for a new trial is made upon this ground the defendant must produce at the hearing the affidavits of the witnesses by

whom such newly-discovered evidence is expected to be given. [Cr. Prac. 1864, § 619; R.S., R.C., & C.L., § 8305; C.S., § 9253; I.C.A., § 19-4027.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cited in: State v. Raaf, 16 Idaho 411, 101 P. 747 (1909).

19-3928. Grounds for arrest of judgment. — The motion in arrest of judgment may be founded on any substantial defect in the complaint, and the effect of an arrest of judgment is to place the defendant in the same situation in which he was before the trial was had. [Cr. Prac. 1864, § 620; R.S., R.C., & C.L., § 8306; C.S., § 9254; I.C.A., § 19-4028.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that

wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cited in: Prairie Flour Mill Co. v. Farmers Elevator Co., 45 Idaho 229, 261 P. 673 (1927).

Validity of Ordinance.

The validity of the ordinance under which a conviction is had may be challenged by a motion for arrest of judgment. Lewiston v. Mathewson, 78 Idaho 347, 303 P.2d 680 (1956).

19-3929. Pronouncement and entry of judgment. — If the judgment is not arrested, or a new trial granted judgment must be pronounced at the time appointed and entered in the minutes of the court. [Cr. Prac. 1864, § 621; R.S., R.C., & C.L., § 8307; C.S., § 9255; I.C.A., § 19-4029.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3930. Discharge of defendant. — If judgment of acquittal is given, or judgment imposing a fine only without imprisonment for nonpayment, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given. [Cr. Prac. 1864, § 622; R.S., R.C., & C.L., § 8308; C.S., § 9256; am. 1929, ch. 7, § 1, p. 9; I.C.A., § 19-4030.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3931. Warrant for execution of judgment. — When a judgment of imprisonment is entered a certified copy thereof must be delivered to the sheriff, marshal or other officer, which is a sufficient warrant for its execution. [Cr. Prac. 1864, § 623; R.S., R.C., & C.L., § 8309; C.S., § 9257; I.C.A., § 19-4031.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Release by Sheriff.

Sheriff may demand certified copy of judgment; but it does not follow that having received prisoners, he can, of his own motion, release prisoners on account of defective form of commitment. *Cornell v. Mason*, 46 Idaho 112, 268 P. 8 (1928).

19-3932. Imprisonment pending payment of fine. — When a judgment is entered imposing a fine, or costs, or both fine and costs, or ordering the defendant to be imprisoned until the fine, or costs, or fine and costs, be paid, he must be held in custody during the time specified in the judgment, unless the fine, or costs, or fine and costs, are sooner paid. [Cr. Prac. 1864, § 624; R.S., § 8310; am. 1899, p. 379, § 7; reen. R.C. & C.L., § 8310; C.S., § 9258; I.C.A., § 19-4032.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order

of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3933. Discharge upon payment of fine. — Upon payment of the fine, or costs, or fine and costs, the officer must discharge the defendant if he is not detained for any other legal cause. [Cr. Prac. 1864, § 625; R.S., § 8311; am. 1899, p. 379, § 8; reen. R.C. & C.L., § 8311; C.S., § 9259; I.C.A., § 19-4033.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3934. Admittance to bail. — The defendant, at any time after his arrest, and before conviction, may be admitted to bail. [R.S., R.C., & C.L., § 8312; C.S., § 9260; I.C.A., § 19-4034; am. 2003, ch. 117, § 1, p. 361.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cross ref. Bail, §§ 19-2901 — 19-2937.

19-3935. Subpoenas for witnesses. — The justice or judge of either of the courts mentioned in this chapter may issue subpoenas for witnesses and punish disobedience thereof, as provided in sections 19-3004, 19-3006 — 19-3012 inclusive. [R.S., R.C., & C.L., § 8313; C.S., § 9261; I.C.A., § 19-4035.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Divi-

sion of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

Cross ref. Compelling attendance of witnesses, §§ 19-3004 — 19-3012.

19-3936. Entitling affidavits. — The provisions in respect to entitling affidavits are applicable to proceedings in the courts mentioned in this chapter. [R.S., R.C., & C.L., § 8314; C.S., § 9262; I.C.A., § 19-4036.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cross ref. Entitling affidavits, § 19-3701.

19-3937, 19-3938. Appeals to district court — Notice. [Repealed.]

Compiler's notes. These sections, which comprised R.S., R.C., & C.L., §§ 8320, 8321; C.S., §§ 9263, 9264; I.C.A., §§ 19-4037, 19-

4038; am. 1945, ch. 20, § 1, p. 28, were repealed by S.L. 1989, ch. 82, § 1.

19-3939. Undertaking for appearance of witnesses. — When notice of intention to appeal is given by the defendant as provided in the last section, the judge or justice may take from each of the material witnesses examined before him on the part of the people, a written undertaking, with or without sureties, to the effect that he will appear and testify in the district court upon the appeal, or that he will forfeit the sum of \$500, as provided in case of commitment upon preliminary examination, or if the witness is unable to procure sureties he may be conditionally examined as there provided. [R.S., R.C., & C.L., § 8322; C.S., § 9265; I.C.A., § 19-4039.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cross ref. Conditional examination, § 19-824.

Security for appearance of witnesses, § 19-821.

Cited in: State v. Barnard, 13 Idaho 439, 90 P. 1 (1907); State v. Dawn, 41 Idaho 199, 239 P. 279 (1925); Smith v. Young, 71 Idaho 31, 225 P.2d 466 (1950).

19-3940. Transmission of papers. — When an appeal is taken the judge or justice must immediately transmit to the clerk of the district court of the county, the complaint, notice of appeal, the depositions of any witnesses examined conditionally as provided in the last section, and any recognizance entered into by the defendant or any witness. [R.S., R.C., & C.L., § 8323; C.S., § 9266; I.C.A., § 19-4040.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court effective July 1, 1980. Now see I.C.R., Rule 1.

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Cited in: State v. Barnard, 13 Idaho 439, 90 P. 1 (1907); State v. Hosford, 27 Idaho 185, 147 P. 286 (1915); State v. Dawn, 41 Idaho 199, 239 P. 279 (1925); Smith v. Young, 71 Idaho 31, 225 P.2d 466 (1950).

Proceedings De Novo.

On appeal, the complaint is the basis for the proceedings de novo in the district court. There may be raised any question which could have been raised had the action been commenced in the district court. The court had authority to determine the issues raised by demurrer. State v. Henry, 83 Idaho 167, 359 P.2d 514 (1961).

19-3941. Bail pending appeal. — The party appealing may, at any time thereafter, if he desires to be released from custody during the pendency of the appeal, or desires a stay of proceedings under the judgment until the appeal be disposed of, enter into a recognizance, with two (2) sufficient sureties to be approved by the judge or justice, in an amount to be fixed by the judge or justice, for the payment of any judgment, fine and costs that may be awarded against him on the appeal, and that he will faithfully prosecute the same and render himself in execution of any judgment or order rendered or entered against him in the district court. Any no contact order in place at the time of appeal shall remain in place during the pendency of appeal and shall be a condition of any bond posted, unless the judge orders otherwise. [R.S., R.C., & C.L., § 8324; C.S., § 9267; I.C.A., § 19-4041; am. 1987, ch. 157, § 1, p. 307; am. 1999, ch. 313, § 1, p. 779.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cross ref. Qualifications of bail, § 19-2910.

Rule to sec. ref. This section is referred to in I.C.R. 54.5.

Cited in: State v. Barnard, 13 Idaho 439, 90 P. 1 (1907); State v. Hosford, 27 Idaho 185, 147 P. 286 (1915); State v. Dawn, 41 Idaho 199, 239 P. 279 (1925); State v. Eikelberger, 70 Idaho 271, 215 P.2d 996 (1950); Smith v. Young, 71 Idaho 31, 225 P.2d 466 (1950); State v. Eikelberger, 71 Idaho 282, 230 P.2d 696 (1951); State v. Anderson, 130 Idaho 765, 947 P.2d 1013 (Ct. App. 1997).

ANALYSIS

Failure to give bond.

Nature of liability.

Failure to Give Bond.

Failure to file the bond herein provided

19-3942. Trial on appeal. — The clerk of the district court must file the papers received, and enter the action on the calendar in its order with other criminal cases, and the same must be tried anew in the district court at the next term thereof, unless for good cause the same be continued. [R.S., R.C., & C.L., § 8325; C.S., § 9268; I.C.A., § 19-4042.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court effective July 1, 1980. Now see I.C.R., Rule 1.

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Cited in: State v. Barnard, 13 Idaho 439, 90 P. 1 (1907); State v. Drury, 25 Idaho 787, 139 P. 1129 (1914); State v. Dawn, 41 Idaho 199, 239 P. 279 (1925); Smith v. Young, 71 Idaho 31, 225 P.2d 466 (1950).

ANALYSIS

Appeal from plea of guilty.

Construction.

Delay of trial.

results only in failure to stay execution of judgment, but does not defeat jurisdiction of district court or render appeal subject to dismissal. State v. Leeper, 30 Idaho 534, 165 P. 997 (1917).

Nature of Liability.

Defendant's liability for fine and costs upon appeal from justice's or probate court (now magistrates division) where bond is given under this section is a civil liability. District court has no power to enter alternative judgment of imprisonment against defendant in case of his failure to pay fine and costs. In re Lucas, 17 Idaho 164, 104 P. 657 (1909); In re Walton, 17 Idaho 171, 104 P. 659 (1909).

Speedy trial.

Trial anew.

Appeal from Plea of Guilty.

Evidence that defendant pleaded guilty in justice's court (now magistrates division) is admissible on trial of same case in district court. State v. Sedam, 62 Idaho 26, 107 P.2d 1065 (1940).

Construction.

Determination of term "unless good cause to the contrary be shown" depends on circumstances of case involved. State v. Eikelberger, 71 Idaho 282, 230 P.2d 696 (1951).

Delay of Trial.

Court may delay trial of defendant on appeal until after next term upon showing of good cause. State v. Eikelberger, 71 Idaho 282, 230 P.2d 696 (1951).

Speedy Trial.

Defendant convicted of crime in probate court (now magistrates division) is entitled to a speedy trial upon appeal to district court. State v. Eikelberger, 71 Idaho 282, 230 P.2d 696 (1951).

Trial Anew.

Under provisions of this section, the case must be tried anew, or de novo. The case is there for a new trial on every point and question that was raised or might have been raised in justice's or probate court (now magistrates division). Motions and demurrers decided by the justice's or probate court (now magistrates division) must be heard by dis-

district court, provided either the state or defendant cares to present them, or defendant may first demur to the complaint in the district court. *State v. Stafford*, 26 Idaho 381, 143 P. 528 (1914); *State v. Ashby*, 40 Idaho 1, 230 P. 1013 (1924).

Upon appeal to district court in criminal case, cause is tried anew upon complaint filed in court of original jurisdiction, and neither new arraignment nor plea is necessary. *State v. Ashby*, 40 Idaho 1, 230 P. 1013 (1924).

The district court is not bound in any way by sentence imposed by justice's or probate court (now magistrates division), but may impose an entirely different punishment. *State v. McNichols*, 62 Idaho 616, 115 P.2d 104.

On appeal of a criminal case from a justice's or probate court (now magistrates division), there is no provision for a remittitur to the

probate or justice's court (now magistrates division). *State v. McNichols*, 62 Idaho 616, 115 P.2d 104.

Defendant convicted in municipal court of driving car on city street while intoxicated in violation of city ordinance, on appeal to district court was entitled to trial by jury, since defendant was entitled to a trial de novo as though action started or commenced in district court, where the defendant is entitled to jury trial. *Miller v. Winstead*, 75 Idaho 262, 270 P.2d 1010 (1954).

On appeal, the complaint is the basis for the proceedings de novo in the district court. There may be raised any question which could have been raised had the action been commenced in the district court. The court had authority to determine the issues raised by demurrer. *State v. Henry*, 83 Idaho 167, 359 P.2d 514 (1961).

19-3943. Costs to abide event. — The costs in both courts shall abide the event of the trial in the district court. [R.S., R.C., & C.L., § 8326; C.S., § 9269; I.C.A., § 19-4043.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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19-3944. Judgment against sureties for costs. — If upon the trial in the district court the defendant is convicted, judgment must be rendered against the defendant and his sureties for the costs in both courts, and for any fine imposed by the district court; and if such fine and costs be not paid, execution must be issued thereon against the defendant and his sureties; but the sureties are not liable on any such judgment or execution beyond the amount of their undertaking. If the defendant fails to appear and prosecute his appeal, judgment must be entered by the district court against the defendant and his sureties in the amount of the undertaking. [R.S., R.C., & C.L., § 8327; C.S., § 9270; I.C.A., § 19-4044.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

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Cited in: *State v. Barnard*, 13 Idaho 439, 90 P. 1 (1907).

ANALYSIS

Application.
 Authority of court.
 Construction.
 Death of defendant.
 Form of judgment.
 Presence of sureties.

Application.

This section does not prevent district court from entering judgment of imprisonment as well as a civil judgment against defendant and his sureties after a trial and verdict of guilty. *State v. Eikelberger*, 71 Idaho 282, 230 P.2d 696 (1951).

Authority of Court.

Where defendant was present at the time fixed for trial, and he was without funds to employ counsel, his refusal to proceed until he could be represented did not constitute a failure to appear and prosecute his appeal, so as to authorize district court to enter judgment against the defendant and his sureties in the amount of the undertaking. *State v. Eikelberger*, 70 Idaho 271, 215 P.2d 996 (1950).

Construction.

The phrase "fails to appear and prosecute his appeal," as used in this section, carries the thought of voluntary abandonment by defendant. *State v. Eikelberger*, 70 Idaho 271, 215 P.2d 996 (1950).

Death of Defendant.

Where defendant died pending an appeal from conviction of selling liquor, his death not

only abated that portion of judgment providing for imprisonment, but also that portion relating to fine and costs. *State v. Stotter*, 67 Idaho 210, 175 P.2d 402 (1946).

Form of Judgment.

Under a stay of proceedings as provided by § 19-3941, after conviction in lower court, and after conviction in district court, under provisions of this section, judgment for a fine or costs, or both fine and costs against defendant and his sureties, should be entered as in a civil action. District court has no jurisdiction to impose an alternative judgment of imprisonment against defendant in case he fails to pay the fine or costs, or both fine and costs. In *re Lucas*, 17 Idaho 164, 104 P. 657 (1909); In *re Walton*, 17 Idaho 171, 104 P. 659 (1909).

District court may enter independent sentence of imprisonment against defendant convicted on appeal, in addition to fine and costs, where same is allowed as a part of the penalty for the specific offense. In *re Lucas*, 17 Idaho 164, 104 P. 657 (1909); In *re Walton*, 17 Idaho 171, 104 P. 659 (1909).

Upon conviction of petit larceny after appeal from probate court (now magistrates division), district court should enter judgment for fine and costs against defendant's sureties. *State v. McAllister*, 48 Idaho 251, 281 P. 7 (1929).

Costs being no part of the penalty, their imposition, although when added to the penalty created a total exceeding \$300.00, was not in excess of the court's jurisdiction. *State v. Scrivner*, 66 Idaho 498, 162 P.2d 897 (1945).

Presence of Sureties.

Civil judgment authorized herein may be entered against defendant and his sureties in district court, whether they be present in court or not. In *re Lucas*, 17 Idaho 164, 104 P. 657 (1909); In *re Walton*, 17 Idaho 171, 104 P. 659 (1909).

19-3945. Jurors and witnesses — Fees and mileage — Application for subpoenas. — Witnesses before examining magistrates and in criminal cases in the probate and justice courts, and jurors and witnesses in a coroner's inquest, are entitled to four dollars (\$4.00) per day for each day actually engaged in the trial of a case, and twenty-five cents (25¢) per mile, one way, which must be paid out of the county treasury; provided, however, that when the state or the defendant requires the attendance of more than three (3) witnesses in its or his behalf, before such witnesses shall be subpoenaed at the county expense, or their fees and mileages be a charge against the county, the county attorney or defendant must make affidavit setting forth that they are witnesses whose evidence is material for the state or the defense, and the facts showing such materiality, and that it or he can not safely go to trial without them. In such case or cases, the court or judge

thereof, at the time the application is made therefor, shall order a subpoena to issue to such of said witnesses as the court or judge thereof may deem material for the state or defendant, and the costs incurred by the process, and the fees and mileage of such witnesses, shall be paid in the same manner that the costs and fees of other witnesses are paid. [1905, p. 173, § 1; reen. R.C. & C.L., § 8338; C.S., § 9271; I.C.A., § 19-4045; am. 1939, ch. 20, § 1, p. 51; am. 1961, ch. 6, § 1, p. 8.]

Compiler's notes. This section had been made inapplicable to criminal actions or appeals from the magistrates division of the district court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promul-

gated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Probate and justices' courts were abolished by S.L. 1969, ch. 100, § 1 which provided that wherever the words "probate court" or "justice court" appear they shall mean district court or magistrate's division of the district court, as the case may be, and that the words "judge," "probate judge" and "justice of the peace" shall mean district judge or magistrate of the district court, as the case may be.

19-3946. Affidavit as to miles traveled. — Each juror and witness must state on oath to the judge, justice or coroner, the number of miles traveled for which he is entitled to pay; but no juror or witness shall receive mileage other than for the distance actually traveled, notwithstanding he may serve or testify in more than one case. [1905, p. 173, § 2; reen. R.C. & C.L., § 8339; C.S., § 9272; I.C.A., § 19-4046.]

Compiler's notes. This section was made a rule of court by Rule 27 of the Rules of the Magistrates Division of the District Court, effective January 11, 1971. However, an order of the Supreme Court of December 27, 1979 rescinded the Rules of the Magistrates Division of the District Court, effective July 1, 1980. Now see I.C.R., Rule 1.

Previously, this section had been made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was re-

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CHAPTER 40

IMPEACHMENTS

SECTION.

- 19-4001. Officers subject to impeachment.
- 19-4002. Articles of impeachment — Preparation and trial.
- 19-4003. Delivery of articles to president of senate.
- 19-4004. Time and notice of hearing.
- 19-4005. Service of notice.
- 19-4006. Failure of defendant to appear.
- 19-4007. Answer or demurrer.
- 19-4008. Overruling demurrer — Plea and trial.

SECTION.

- 19-4009. Senate to be sworn.
- 19-4010. Vote necessary for conviction.
- 19-4011. Judgment of conviction.
- 19-4012. Adoption of judgment.
- 19-4013. Extent of judgment.
- 19-4014. Judgment of suspension.
- 19-4015. Suspension pending trial.
- 19-4016. Impeachment not a bar to indictment.

19-4001. Officers subject to impeachment. — Any state officer, created by state law, shall be liable to impeachment for any misdemeanor in office. [Cr. Prac. 1864, § 49; R.S., R.C., & C.L., § 7425; C.S., § 8654; I.C.A., § 19-4101.]

Collateral References. 63C Am. Jur. 2d, Public Officers and Employees, § 218 et seq.

19-4002. Articles of impeachment — Preparation and trial. — All impeachments must be by resolution adopted and originated in the house of representatives, and conducted by managers elected by the house, who must prepare articles of impeachment, present them at the bar of the senate, and prosecute the same. The trial must be had before the senate, sitting as a court of impeachment. [Cr. Prac. 1864, § 50; R.S., R.C., & C.L., § 7426; C.S., § 8655; I.C.A., § 19-4102.]

Cross ref. House of representatives alone has power to impeach, Const., art. 5, § 4.	Senate is court of impeachment, Const., art. 5, § 3.
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19-4003. Delivery of articles to president of senate. — When an officer is impeached by the house of representatives for a misdemeanor in office, the articles of impeachment must be delivered to the president of the senate. [Cr. Prac. 1864, § 51, R.S., R.C., & C.L., § 7427; C.S., § 8656; I.C.A., § 19-4103.]

19-4004. Time and notice of hearing. — The senate must assign a day for the hearing of the impeachment and inform the house of representatives thereof. The president of the senate must cause a copy of the articles of impeachment, with a notice to appear and answer the same at the time and place appointed, to be served on the defendant not less than ten (10) days before the day fixed for the hearing. [Cr. Prac. 1864, § 52; R.S., R.C., & C.L., § 7428; C.S., § 8657; I.C.A., § 19-4104.]

Sec. to sec. ref. This section is referred to
in § 19-4006.

19-4005. Service of notice. — The service must be made upon the defendant personally, or if he cannot, upon diligent inquiry, be found within the state, the senate, upon proof of that fact, may order publication to be made, in such manner as it may deem proper, of a notice requiring him to appear at a specified time and place, and answer the articles of impeachment. [Cr. Prac. 1864, § 53; R.S., R.C., & C.L., § 7429; C.S., § 8656; I.C.A., § 19-4105.]

Sec. to sec. ref. This section is referred to
in § 19-4006.

19-4006. Failure of defendant to appear. — If the defendant does not appear, the senate, upon proof of service or publication, as provided in the last two (2) sections, may, of its own motion or for cause shown, assign

another day for hearing the impeachment, or may proceed in the absence of the defendant to trial and judgment. [Cr. Prac. 1864, § 54; R.S., R.C., & C.L., § 7430; C.S., § 8659; I.C.A., § 19-4106.]

19-4007. Answer or demurrer. — When the defendant appears he may, in writing, object to the sufficiency of the articles of impeachment, or he may answer the same by an oral plea of not guilty, which plea must be entered upon the journal, and puts in issue every material allegation of the articles of impeachment. [Cr. Prac. 1864, §§ 55, 56; R.S., R.C., & C.L., § 7431; C.S., § 8660; I.C.A., § 19-4107.]

19-4008. Overruling demurrer — Plea and trial. — If the objection to the sufficiency of the articles of impeachment is not sustained by a majority of the members of the senate who heard the argument, the defendant must be ordered forthwith to answer the articles of impeachment. If he then pleads guilty, or refuses to plead, the senate must render judgment of conviction against him. If he pleads not guilty, the senate must at such time as it may appoint, proceed to try the impeachment. [Cr. Prac. 1864, § 57; R.S., R.C., & C.L., § 7432; C.S., § 8661; I.C.A., § 19-4108.]

19-4009. Senate to be sworn. — At the time and place appointed and before the senate proceeds to act on the impeachment, the secretary must administer to the president of the senate, and the president of the senate to each of the members of the senate then present, an oath truly and impartially to hear, try, and determine the impeachment; and no member of the senate can act or vote upon the impeachment or upon any question arising thereon without having taken such oath. [Cr. Prac. 1864, § 58; R.S., R.C., & C.L., § 7433; C.S., § 8662; I.C.A., § 19-4109.]

Cross ref. Chief justice to preside when governor is impeached, Const., art. 5, § 4.

19-4010. Vote necessary for conviction. — The defendant cannot be convicted on an impeachment without the concurrence of two-thirds (2/3) of the members elected, voting by ayes and noes, and if two-thirds (2/3) of the members elected do not concur in a conviction, he must be acquitted. [Cr. Prac. 1864, § 60; R.S., § 7434; am. R.C., & C.L., § 7434; C.S., § 8663; I.C.A., § 19-4110.]

Cross ref. Two-thirds vote necessary for conviction, Const., art. 5, § 4.

19-4011. Judgment of conviction. — After conviction the senate must, at such time as it may appoint, pronounce judgment in the form of a resolution, entered upon the journals of the senate. [Cr. Prac. 1864, § 61; R.S., R.C., & C.L., § 7435; C.S., § 8664; I.C.A., § 19-4111.]

19-4012. Adoption of judgment. — On the adoption of the resolution by a majority of the members present who voted on the question of acquittal or conviction, it becomes the judgment of the senate. [Cr. Prac. 1864, § 62; R.S., R.C., & C.L., § 7436; C.S., § 8665; I.C.A., § 19-4112.]

19-4013. Extent of judgment. — The judgment may be that the defendant be suspended and removed from office, or that he be removed from office and disqualified to hold and enjoy a particular office, or class of offices, or any office in this state. [Cr. Prac. 1864, § 63; R.S., R.C., & C.L., § 7437; C.S., § 8666; I.C.A., § 19-4113.]

Cross ref. Judgment shall not extend beyond removal from, and disqualification to hold, office, but the party is liable to indictment, Const., art. 5, § 3.

19-4014. Judgment of suspension. — If judgment of suspension is given, the defendant, during the continuance thereof, is disqualified from receiving the salary, fees, or emoluments of the office. [Cr. Prac. 1864, § 64; R.S., R.C., & C.L., § 7438; C.S., § 8667; I.C.A., § 19-4114.]

19-4015. Suspension pending trial. — Whenever articles of impeachment against any officer subject to impeachment are presented to the senate, such officer is temporarily suspended from his office, and cannot act in his official capacity until he is acquitted. Upon such suspension of any state officer, his office must at once be temporarily filled by an appointment made by the governor, with the advice and consent of the senate, until the acquittal of the party impeached; or, in case of his removal, until the vacancy is filled as required by law. [Cr. Prac. 1864, § 65; R.S., R.C., & C.L., § 7439; C.S., § 8668; I.C.A., § 19-4115.]

19-4016. Impeachment not a bar to indictment. — If the offense for which the defendant is convicted on impeachment is also the subject of an indictment, the indictment is not barred thereby. [Cr. Prac. 1864, § 66; R.S., R.C., & C.L., § 7440; C.S., § 8669; I.C.A., § 19-4116.]

Cross ref. Indictment not barred, Const., art. 5, § 3.

CHAPTER 41

REMOVAL OF CIVIL OFFICERS

SECTION.

- 19-4101. Presentation of accusation.
- 19-4102. Form of accusation.
- 19-4103. Service on defendant.
- 19-4104. Appearance and answer — Default.
- 19-4105. Answer or demurrer.
- 19-4106. Form of demurrer.
- 19-4107. Form of denial.
- 19-4108. Answer after overruling demurrer.

SECTION.

- 19-4109. Proceedings on plea.
- 19-4110. Trial by jury.
- 19-4111. Process for witnesses.
- 19-4112. Judgment of removal.
- 19-4113. Appeal — How taken and effect.
- 19-4114. Removal of prosecuting attorney.
- 19-4115. [Repealed.]

19-4101. Presentation of accusation. — An accusation in writing against any district, county, precinct, or municipal officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. [Cr. Prac. 1864, § 67; R.S., R.C., & C.L., § 7445; C.S., § 8670; I.C.A., § 19-4201.]

Cross ref. Removal of appointive city officers, § 50-206.

Sec. to sec. ref. This chapter is referred to in §§ 18-2301, 19-902, 23-802, 23-805, 23-936, 31-2227.

Cited in: *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900); *State v. Barnard*, 13 Idaho 439, 90 P. 1 (1907); *Hodges v. Tucker*, 25 Idaho 503, 138 P. 1139 (1914); *Collman v. Wanamaker*, 27 Idaho 342, 149 P. 292 (1915); *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915); *Corker v. Ake*, 30 Idaho 218, 164 P. 87 (1916); *Jacobson v. McMillan*, 64 Idaho 351, 132 P.2d 773 (1943).

ANALYSIS

Accusation.

County officers.

Malfeasance.

Remedy not exclusive.

Accusation.

Accusation under this section must be by prosecuting attorney or by grand jury. *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

County Officers.

This and the following sections authorize the prosecution and removal of county officers for all wilful or corrupt misconduct in office other than that mentioned in § 19-4115 (now repealed). *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

Members of the county board of equalization may be prosecuted under this chapter for wilful and corrupt equalization of assessments. *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

Board of highway commissioners may be removed for corrupt estimate of probable amount of money coming into treasurer's hands. *Walton v. Channel*, 34 Idaho 532, 34 Idaho 544, 204 P. 661 (1921).

Majority members of the board of county commissioners should not be compelled to bring what are in effect criminal proceedings

or charges, where such are not necessary to effect their purpose: removal from office. *Gowey v. Siggelkow*, 85 Idaho 574, 382 P.2d 764 (1963).

Where the law does not purport to fix the term of the chairman of the board of trustees nor provide any grounds upon which such officer may be removed, nor is any mention made of the power or authority to remove such officer, the general rule, almost universally accepted, applies in such case; that is, the power to remove is incident to the power to appoint, and the authority to appoint an officer carries with it the authority to remove such officer, in the absence of any constitutional or statutory restriction. *Gowey v. Siggelkow*, 85 Idaho 574, 382 P.2d 764 (1963).

Malfeasance.

Where an information charges that defendant knowingly, intentionally, and illegally performed the duties of his office, said allegations do not charge that defendant refused to perform the duties of his office within the meaning of § 19-4115 (now repealed), but defendant would be subject to prosecution under indictment as provided under §§ 19-4101 — 19-4113. *Daugherty v. Nagel*, 28 Idaho 302, 154 P. 375 (1915); *Archbold v. Huntington*, 34 Idaho 558, 201 P. 1041 (1921).

Remedy Not Exclusive.

Remedy here provided for removal of civil officers is not an exclusive remedy, nor does it prohibit village trustees from removing appointive officers. *Conwell v. Culdesac*, 13 Idaho 575, 92 P. 535 (1907).

Collateral References. 63C Am. Jur. 2d, Public Officers and Employees, § 1 et seq. 67 C.J.S., Officers and Public Employees, § 1 et seq.

Removal of public officer for misconduct during previous term. 42 A.L.R.3d 691.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct. 63 A.L.R.3d 586.

19-4102. Form of accusation. — The accusation must state the offense charged, in ordinary and concise language, and without repetition. [Cr. Prac. 1864, § 68; R.S., R.C., & C.L., § 7446; C.S., § 8671; I.C.A., § 19-4202.]

DECISIONS UNDER PRIOR LAW

ANALYSIS

Information.

Nature of proceeding.

Information.

Information or accusation by which an action is commenced to remove public officer

from office should charge with certainty the specific acts of omission or commission for which removal is sought. *Smith v. Ellis*, 7 Idaho 196, 61 P. 695 (1900); *Miller v. Smith*, 7 Idaho 204, 61 P. 824 (1900).

Information seeking to remove public officer from office on ground that he received

and collected illegal fees for himself is not vitiated by a further improper allegation of the allowance by him of illegal fees to others or subject to demurrer for misjoinder of causes of action; but court should strike the improper allegations from the files and proceed to hear the cause on the proper allegations of the information. *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900).

Information which charges that defendant, as county commissioner, charged and collected the per diem and mileage for services rendered by him in viewing roads and bridges and that he did so wilfully, knowingly, and corruptly, states good cause for removal of such officer under this section and of awarding to informant the penalty provided for. *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900).

Allegations of an information should be made positively when the facts are of record and accessible, or are within the personal knowledge of informant; otherwise they may be made on information and belief. *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

Information under former § 19-4115 which charges defendant with knowingly, wilfully, and intentionally charging and collecting illegal fees, specifying them, or knowingly, wilfully and intentionally refusing to perform or neglecting to perform an official duty, specifying such duty, is sufficient. *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

Where information charges that defendant knowingly, intentionally, and illegally performed the duties of his office, the allegation

is properly stricken. However, defendant is subject to prosecution under §§ 19-4101 — 19-4113. *Daugherty v. Nagel*, 28 Idaho 302, 154 P. 375 (1915).

Information should state specific acts of omission or commission for which removal is sought with clearness and certainty. *Archbold v. Huntington*, 34 Idaho 558, 201 P. 1041 (1921).

Provisions of statute requiring that indictment or information charge but one offense do not apply to proceedings under this section. *Archbold v. Huntington*, 34 Idaho 558, 201 P. 1041 (1921).

Nature of Proceeding.

An action under former § 19-4115 is not a criminal proceeding and informant may appeal under § 13-201 from a judgment in favor of officer. *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900).

These proceedings are in the nature of a quo warranto and are quasi criminal. *Daugherty v. Nagel*, 27 Idaho 511, 149 P. 729 (1915); *Archbold v. Huntington*, 34 Idaho 558, 201 P. 1041 (1921).

Action provided for in former § 19-4115 being of a public nature and for the public good may be commenced either in name of the state as plaintiff or in name of informant. Action of district court in permitting a change of style of action from "state of Idaho, plaintiff," to "A. plaintiff," is error, but such error affects no substantial right of defendant, is not prejudicial, and will not be considered on appeal. *Smith v. Ellis*, 7 Idaho 196, 61 P. 695 (1940).

19-4103. Service on defendant. — The accusation must be delivered by the foreman of the grand jury to the prosecuting attorney of the county (except when he is the officer accused), who must cause a copy thereof to be served upon the defendant, and require by notice in writing, of not less than ten (10) days, that he appear before the district court of the county, then sitting or at its next term, and answer the accusation. The original accusation must then be filed with the clerk of the district court. [Cr. Prac. 1864, § 69; R.S., R.C., & C.L., § 7447; C.S., § 8672; I.C.A., § 19-4203.]

Cited in: *Ponting v. Isaman*, 7 Idaho 283, 62 P. 680 (1900); *Corker v. Pence*, 12 Idaho 152, 85 P. 388 (1906).

19-4104. Appearance and answer — Default. — The defendant must appear at the time appointed in the notice and answer the accusation, unless for some sufficient cause the court assign another day for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence. [Cr. Prac. 1864, § 70; R.S., R.C., & C.L., § 7448; C.S., § 8673; I.C.A., § 19-4204.]

19-4105. Answer or demurrer. — The defendant may answer the accusation either by objecting to the sufficiency thereof, or of any article therein, or by denying the truth of the same. [Cr. Prac. 1864, § 71; R.S., R.C., & C.L., § 7449; C.S., § 8674; I.C.A., § 19-4205.]

19-4106. Form of demurrer. — If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. [Cr. Prac. 1864, § 72; R.S., R.C., & C.L., § 7450; C.S., § 8675; I.C.A., § 19-4206.]

19-4107. Form of denial. — If he denies the truth of the accusation, the denial may be oral and without oath, and must be entered upon the minutes. [Cr. Prac. 1864, § 73; R.S., R.C., & C.L., § 7451; C.S., § 8676; I.C.A., § 19-4207.]

19-4108. Answer after overruling demurrer. — If an objection to the sufficiency of the accusation is not sustained, the defendant must answer thereto forthwith. [Cr. Prac. 1864, § 74; R.S., R.C., & C.L., § 7452; C.S., § 8677; I.C.A., § 19-4208.]

19-4109. Proceedings on plea. — If the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matters charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation. [Cr. Prac. 1864, § 75; R.S., R.C., & C.L., § 7453; C.S., § 8678; I.C.A., § 19-4209.]

19-4110. Trial by jury. — The trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor. [Cr. Prac. 1864, § 76; R.S., R.C., & C.L., § 7454; C.S., § 8679; I.C.A., § 19-4210.]

Cross ref. Trials in criminal actions, § 19-2101 et seq.

19-4111. Process for witnesses. — The prosecuting attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of an indictment. [Cr. Prac. 1864, § 77; R.S., R.C., & C.L., § 7455; C.S., § 8680; I.C.A., § 19-4211.]

19-4112. Judgment of removal. — Upon a conviction, the court must, at such time as it may appoint, pronounce a judgment that the defendant be removed from office; but, to warrant a removal, the judgment must be entered upon the minutes, and the causes of removal must be assigned therein. [Cr. Prac. 1864, § 78; R.S., R.C., & C.L., § 7456; C.S., § 8681; I.C.A., § 19-4212.]

DECISIONS UNDER PRIOR LAW

Jurisdiction of Court.

If the district court was without subject matter jurisdiction to remove an elected district judge from office pursuant to former § 19-4115, then the action of the district court in dismissing an action sua sponte, brought

by a citizen against a judge for statutory and constitutional irregularities was correct. *Pittam v. Maynard*, 103 Idaho 177, 646 P.2d 419 (1982).

Cited in: *Walton v. Channel*, 34 Idaho 544, 204 P. 661 (1922).

19-4113. Appeal — How taken and effect. — From a judgment of removal an appeal may be taken to the Supreme Court, in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy. [Cr. Prac. 1864, § 79; R.S., R.C., & C.L., § 7457; C.S., § 8682; I.C.A., § 19-4213.]

Cross ref. Appeals in civil actions, § 13-201 et seq; Idaho Appellate Rules.

DECISIONS UNDER PRIOR LAW

Appeal.

Recall is the exclusive remedy for the removal of officers in cities adopting the commission form of government. Adoption of said form of government has the effect of suspending the operation of former § 19-4115. *Hodges v. Tucker*, 25 Idaho 563, 138 P. 1139 (1914).

Appeal from final judgment in a proceeding

under former § 19-4115 is governed by the statutes and rules of court relative to civil appeals. *Worthman v. Shane*, 31 Idaho 433, 173 P. 750 (1918).

Motion to dismiss appeal from judgment for defendant will be granted on a showing that defendant is dead. *Dygert v. Harrison*, 34 Idaho 377, 201 P. 719 (1921).

19-4114. Removal of prosecuting attorney. — The same proceedings may be had on like grounds for the removal of a prosecuting attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to the district judge of the district, who must thereupon appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the prosecuting attorney of an adjoining county, and require him to conduct the proceedings. [Cr. Prac. 1864, § 80; R.S., R.C., & C.L., § 7458; C.S., § 8683; I.C.A., § 19-4214.]

19-4115. Summary proceedings for removal of civil officers. [Repealed.]

Compiler's notes. Former § 19-4115, which comprised R.S., R.C., C.L., § 7459; C.S., § 8684; am. 1923, ch. 97, § 1, p. 121;

I.C.A., § 19-4215, was repealed by S.L. 1999, ch. 103, § 1, effective July 1, 1999.

CHAPTER 42

HABEAS CORPUS AND INSTITUTIONAL LITIGATION PROCEDURES ACT

SECTION.

19-4201. Short title.

19-4201A. Definitions.

19-4202. Jurisdiction to consider petitions for writ of habeas corpus.

SECTION.

19-4203. Who may petition for a writ of habeas corpus.

19-4204. Application for writ of habeas corpus by a person not a prisoner.

SECTION.

- 19-4205. Application for writ of habeas corpus by a prisoner.
- 19-4206. Prisoners required to exhaust administrative remedies in conditions of confinement cases.
- 19-4207. Application for writ of habeas corpus on behalf of another.
- 19-4208. General procedures governing habeas corpus proceedings.
- 19-4209. Procedures governing prisoner habeas corpus proceedings.
- 19-4210. Discovery in habeas corpus proceedings.
- 19-4211. Issuance of writ of habeas corpus.
- 19-4212. Injunctive relief available to a person not a prisoner.
- 19-4213. Relief available for constitutional violations during the course of revocation of parole.
- 19-4214. Relief available for miscalculation of sentence.
- 19-4215. Relief available for loss of good time credits.
- 19-4216. Relief available for detainees.

SECTION.

- 19-4217. Injunctive relief available to prisoners and other institutionalized persons in conditions of confinement cases.
- 19-4218. Termination of injunctive relief order or decree in conditions of confinement cases.
- 19-4219. Immediate termination of order or decree for prospective relief in conditions of confinement cases.
- 19-4220. Settlements and consent decrees in conditions of confinement cases.
- 19-4221. Successive claims.
- 19-4222. Prior showing of physical injury or mental illness required.
- 19-4223. Right of access to court not expanded.
- 19-4224. Exclusive remedy.
- 19-4225. Liberty interest not created.
- 19-4226. Severability.
- 19-4227 — 19-4236. [Repealed.]

19-4201. Short title. — Sections 19-4201 through 19-4226, Idaho Code, shall be known and may be cited as the “Idaho Habeas Corpus and Institutional Litigation Procedures Act.” [I.C., § 19-4201, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler’s notes. The following sections were repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999:

Former § 19-4201, which comprised I.C., § 19-4201, as added by 1864, p. 606, § 1; R.S., R.C., & C.L., § 8340; C.S., § 9273; I.C.A., § 19-4301, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4202, which comprised I.C., § 19-4202, as added by 1864, p. 606, § 2; R.S., R.C., & C.L., § 8341; C.S., § 9274; I.C.A., § 19-4302, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4203, which comprised I.C., § 19-4203, as added by 1864, p. 606, § 3; R.S., R.C., & C.L., § 8342; C.S., § 9275; I.C.A., § 19-4303, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4204, which comprised I.C., § 19-4204, as added by 1864, p. 606, § 4; R.S., R.C., & C.L., § 8343; C.S., § 9276; I.C.A., § 19-4304, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4205, which comprised I.C., § 19-4205, as added by 1864, p. 606, § 5; R.S., R.C., & C.L., § 8344; C.S., § 9277; I.C.A., § 19-4305, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4206, which comprised I.C., § 19-4206, as added by 1864, p. 606, §§ 6, 8; R.S., R.C., & C.L., § 8345; C.S., § 9278;

I.C.A., § 19-4306, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4207, which comprised I.C., § 19-4207, as added by 1864, p. 606, § 9; R.S., R.C., & C.L., § 8346; C.S., § 9279; I.C.A., § 19-4207, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4208, which comprised I.C., § 19-4208, as added by 1864, p. 606, § 10; R.S., R.C., & C.L., § 8347; C.S., § 9280; I.C.A., § 19-4308, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4209, which comprised I.C., § 19-4209, as added by 1864, p. 606, § 11; R.S., R.C., & C.L., § 8348; C.S., § 9281; I.C.A., § 19-4309, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4210, which comprised I.C., § 19-4210, as added by 1864, p. 606, §§ 12, 13; R.S., R.C., & C.L., § 8349; C.S., § 9282; I.C.A., § 19-4310, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4211, which comprised I.C., § 19-4211, as added by 1864, p. 606, § 14; R.S., R.C., & C.L., § 8350; C.S., § 9283; I.C.A., § 19-4311, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4212, which comprised I.C., § 19-4212, as added by 1864, p. 606, §§ 15-17; R.S., R.C., & C.L., § 8351; C.S., § 9284; I.C.A., § 19-4312, was repealed by S.L. 1999,

ch. 376, § 1, effective July 1, 1999.

Former § 19-4213, which comprised I.C., § 19-4213, as added by 1864, p. 606, § 18; R.S., R.C., & C.L., § 8352; C.S., § 9285; I.C.A., § 19-4313, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4214, which comprised I.C., § 19-4214, as added by 1864, p. 606, § 19; R.S., R.C., & C.L., § 8353; C.S., § 9286; I.C.A., § 19-4314, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4215, which comprised I.C., § 19-4215, as added by 1864, p. 606, § 20; R.S., R.C., & C.L., § 8354; C.S., § 9287; I.C.A., § 19-4315, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4216, which comprised I.C., § 19-4216, as added by 1864, p. 606, § 21; R.S., R.C., & C.L., § 8355; C.S., § 9288; I.C.A., § 19-4316, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4217, which comprised I.C., § 19-4217, as added by 1864, p. 606, § 22; R.S., R.C., & C.L., § 8356; C.S., § 9289; I.C.A., § 19-4317, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4218, which comprised I.C., § 19-4218, as added by 1864, p. 606, § 23; R.S., R.C., & C.L., § 8357; C.S., § 9290; I.C.A., § 19-4318, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4219, which comprised I.C., § 19-4219, as added by 1864, p. 606, § 24; R.S., R.C., & C.L., § 8358; C.S., § 9291; I.C.A., § 19-4319, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4220, which comprised I.C., § 19-4220, as added by 1864, p. 606, § 25; R.S., R.C., & C.L., § 8359; C.S., § 9292; I.C.A., § 19-4320, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4221, which comprised I.C., § 19-4221, as added by 1864, p. 606, § 26; R.S., R.C., & C.L., § 8360; C.S., § 9293; I.C.A., § 19-4321, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4222, which comprised I.C., § 19-4222, as added by 1864, p. 606, § 27;

R.S., R.C., & C.L., § 8361; C.S., § 9294; I.C.A., § 19-4322, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4223, which comprised I.C., § 19-4223, as added by 1864, p. 606, § 28; R.S., R.C., & C.L., § 8362; C.S., § 9295; I.C.A., § 19-4323, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4224, which comprised I.C., § 19-4224, as added by 1864, p. 606, § 29; R.S., R.C., & C.L., § 8363; C.S., § 9296; I.C.A., § 19-4324, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4225, which comprised I.C., § 19-4225, as added by 1864, p. 606, § 30; R.S., R.C., & C.L., § 8364; C.S., § 9297; I.C.A., § 19-4325, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former § 19-4226, which comprised I.C., § 19-4226, as added by 1864, p. 606, § 31; R.S., R.C., & C.L., § 8365; C.S., § 9298; I.C.A., § 19-4326, was repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Former §§ 19-4227 — 19-4236, which comprised I.C., §§ 19-4227 — 19-4236, as added by 1864, p. 606, § 32; R.S., R.C., & C.L., § 8366; C.S., § 9299; I.C.A., § 19-4327; 1864, p. 606, § 33; R.S., R.C., & C.L., § 8367; C.S., § 9300; I.C.A., § 19-4328; 1864, p. 606, § 34; R.S., R.C., & C.L., § 8368; C.S., § 9301; I.C.A., § 19-4329; 1864, p. 606, § 35; R.S., R.C., & C.L., § 8369; C.S., § 9302; I.C.A., § 19-4330; 1864, p. 606, § 36; R.S., R.C., & C.L., § 8370; C.S., § 9303; I.C.A., § 19-4331; R.S., R.C., & C.L., § 8371; C.S., § 9304; I.C.A., § 19-4332; 1864, p. 606, § 37; R.S., R.C., & C.L., § 8372; C.S., § 9305; I.C.A., § 19-4333; am. 1967, ch. 217, § 1, p. 663; R.S., R.C., & C.L., § 6876; C.S., § 9306; I.C.A., § 19-4334; R.S., R.C., & C.L., § 8374; C.S., § 9307; I.C.A., § 19-4335; 1875, p. 467, § 38; R.S., R.C., & C.L., § 6878; C.S., § 9308; I.C.A., § 19-4336, were repealed by S.L. 1999, ch. 376, § 1, effective July 1, 1999.

Cited in: *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

19-4201A. Definitions. — As used in this chapter:

(1) "Correctional facility" means a facility for the confinement of prisoners. Unless otherwise specifically provided, the term shall include a state, local or private correctional facility.

(2) "In-state prisoner" means a person who has been convicted of a crime in the state of Idaho and is either incarcerated in a correctional facility for that crime or is in custody for trial and sentencing.

(3) "Institution" or "state or county institution" means a place owned or operated by or under the control of the state or county in which a person other than a prisoner is restrained and with respect to which restraint the person may file a petition for a writ of habeas corpus under the provisions of this chapter.

(4) “Local correctional facility” means a facility for the confinement of prisoners operated by or under the control of a county or city. The term shall include any reference to “jail” or “county jail.”

(5) “Out-of-state prisoner” means a person who has been convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility in the state of Idaho, or who is being transported in any manner within or through the state of Idaho.

(6) “Prisoner” includes an in-state or out-of-state prisoner, unless otherwise specifically provided or unless the context clearly indicates otherwise.

(7) “Private correctional facility” means a correctional facility owned or operated in the state of Idaho by a private prison contractor.

(8) “Private prison contractor” means any person, organization, partnership, joint venture, corporation or other business entity engaged in the site selection, design, design/building, acquisition, construction, construction/management, financing, maintenance, leasing, leasing/purchasing, management or operation of private correctional facilities or any combination of these services.

(9) “State correctional facility” means a correctional facility owned or operated by or under the control of the state of Idaho. [I.C., § 19-4201A, as added by 2000, ch. 271, § 1, p. 777.]

Compiler’s notes. Section 2 of S.L. 2000, ch. 271, is compiled as § 19-4203.

Section 15 of S.L. 2000, ch. 271 declared an

emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in § 19-4203.

19-4202. Jurisdiction to consider petitions for writ of habeas corpus. — The following courts of this state shall have original jurisdiction to consider a petition for writ of habeas corpus, grant the writ and/or order relief under this chapter:

(1) The supreme court; or

(2) The district court of the county in which the person is detained. [I.C., § 19-4202, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler’s notes. Former § 19-4202 was repealed. See Compiler’s note, § 19-4201.

Cross ref. Jurisdiction of district court, § 1-705.

Jurisdiction of Supreme Court, Const., Art. 5, § 9; § 1-203.

Sec. to sec. ref. This section is referred to in § 19-4211.

Dismissal Without Prejudice.

Defendant’s petition for habeas corpus relief was dismissed without prejudice because she failed to file it in the county in which she was being detained. *Row v. State*, 135 Idaho 573, 21 P.3d 895 (2001).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Release from mental institution.
Supreme Court.
Where writ returnable.

Release from Mental Institution.

An application for release from mental institution upon the basis of an invalid commitment order fell outside of the committing court’s continuing jurisdiction under former

statute requiring automatic commitment of defendant acquitted on ground of mental disease or defect and was properly brought by means of an application for writ of habeas corpus in the district court where the person was restrained. *Penny v. State, Dep't of Health & Welfare*, 103 Idaho 689, 652 P.2d 193 (1982).

Supreme Court.

Supreme Court, in the exercise of its original jurisdiction in habeas corpus, can not review as upon appeal questions which were properly presentable to the trial court upon arraignment or subsequent thereto. In *re Knudtson*, 10 Idaho 676, 79 P. 641 (1905).

Appellate jurisdiction of Supreme Court in habeas corpus proceedings does not conflict with or deprive court of its original jurisdic-

tion granted by constitution. In *re Jennings*, 46 Idaho 142, 267 P. 227 (1928).

Upon original application to Supreme Court for writ of habeas corpus, some sufficient reason must be assigned for invoking its original jurisdiction in the matter. In *re Barlow*, 48 Idaho 309, 282 P. 380 (1929).

Since Supreme Court has jurisdiction to review decisions of district court in habeas corpus proceedings (Const., Art. 5, § 9), it will not exercise its original jurisdiction under this section save in extraordinary cases. In *re Barlow*, 48 Idaho 309, 282 P. 380 (1929).

Where Writ Returnable.

Supreme Court has authority to make writ returnable before any court. *Jain v. Priest*, 30 Idaho 273, 164 P. 364 (1917).

19-4203. Who may petition for a writ of habeas corpus. — (1) Any person, not a prisoner as defined in section 19-4201A, Idaho Code, who believes he is unlawfully restrained of his liberty in this state may file a petition for writ of habeas corpus to request that the court inquire into the cause and/or legality of the restraint.

(2) An in-state prisoner, as defined in section 19-4201A, Idaho Code, or a person who is restrained of his liberty while involved in parole revocation proceedings, or while held on an agent or commission warrant in this state, may file a petition for writ of habeas corpus to request that a court inquire into state or federal constitutional questions concerning:

- (a) The conditions of his confinement;
- (b) Revocation of parole;
- (c) Miscalculation of his sentence;
- (d) Loss of good time credits;
- (e) A detainer lodged against him.

(3) An out-of-state prisoner, as defined in section 19-4201A, Idaho Code, may file a petition for writ of habeas corpus only to request that an Idaho court inquire into a state or federal constitutional question concerning the conditions of his confinement. Habeas corpus relief shall not be available for an out-of-state prisoner to challenge:

- (a) Any issue concerning the legality of his out-of-state conviction or sentence;
- (b) Any issue concerning the legality of the fact or duration of his confinement in this state;
- (c) Any issue concerning the legality of the contract or agreement or any terms thereof pursuant to which he is housed in this state;
- (d) Any issue concerning the grant, denial or revocation of parole for his out-of-state conviction and sentence;
- (e) Miscalculation of his out-of-state sentence;
- (f) Loss of out-of-state good time credits or lack of (failure to grant) good time credits under the laws of the state of Idaho;
- (g) A detainer lodged against him.

(4) Habeas corpus shall not be used as a substitute for, or in addition to, a direct appeal of a criminal conviction or proceedings under Idaho criminal

rule 35 or the uniform post-conviction procedures act, chapter 49, title 19, Idaho Code, and the statutes of limitations imposed therein.

(5) Habeas corpus shall not be used as a substitute for or in addition to proceedings available in child custody matters and proceedings under the Idaho domestic violence crime prevention act, chapter 63, title 39, Idaho Code.

(6) Habeas corpus is an individual remedy only.

(7) For purposes of this chapter and any other civil challenges to conditions of confinement, the term “conditions of confinement” shall be defined as any civil proceeding with respect to a condition in any state or county institution, or state, local or private correctional facility, as those terms are defined in section 19-4201A, Idaho Code, arising under state or federal law pertaining to the conditions of confinement or the effects of actions by government officials or employees of a private prison contractor while employed at a private correctional facility in the state of Idaho on the life of a person confined in a state or county institution, or a state, local or private correctional facility. [I.C., § 19-4203, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 2, p. 777.]

Compiler’s notes. Former § 19-4203 was repealed. See Compiler’s note, § 19-4201.

Section 1 and 3 of S.L. 2000, ch. 271 are compiled as §§ 19-4201A and 19-4205, respectively.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

Cross ref. No fees can be charged by officers in habeas corpus proceedings, § 31-3212.

Privilege of writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety requires it, Const., Art. 1, § 5.

Right of accused in extradition proceedings to apply for writ of habeas corpus, § 19-4510.

Sec. to sec. ref. This section is referred to in §§ 19-4205 and 19-4207.

Cited in: *Quinlan v. Idaho Comm’n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

ANALYSIS

Grounds for writ.

Mootness.

Grounds for Writ.

Magistrate and district court erred in dismissing the inmate’s petition for habeas corpus relief for lack of subject matter jurisdiction as a habeas corpus petition was the proper mechanism for the inmate to challenge an allegedly illegal denial of parole. *Dopp v. Idaho Comm’n of Pardons & Parole*, — Idaho —, 84 P.3d 593 (Ct. App. 2004).

Mootness.

Where an inmate filed a pro se petition for habeas corpus relief claiming that prison disciplinary proceedings were pursued against him in retaliation for his spoken threat of litigation against a prison guard, the habeas corpus petition was governed by the Idaho Rules of Civil Procedure; hence, where the inmate’s claims were moot, the petition was properly dismissed by a grant of summary judgment to the State under Idaho R. Civ. P. 56(c). *Freeman v. Idaho Dep’t of Corr.*, 138 Idaho 872, 71 P.3d 471 (Ct. App. 2003).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Bastardy proceedings.

Civil procedure rules applicable.

Constitutional remedy.

Custody of infant.

Grounds for writ.

Nature of remedy.

Security for costs.

Suspension of habeas corpus.

Bastardy Proceedings.

Sessions Law 1925, ch. 198, providing for bastardy proceedings, was held unconstitutional in *State v. Wilmot*, 51 Idaho 233, 4 P.2d 363 (1931).

Civil Procedure Rules Applicable.

The Idaho Civil Rules of Procedure are applicable to habeas corpus proceedings. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Constitutional Remedy.

Writ of habeas corpus is constitutional, not a statutory remedy, and statutes enacted to add to efficacy of the writ should be construed so as to promote the effectiveness of the proceeding. *Mahaffey v. State*, 87 Idaho 228, 392 P.2d 279 (1964).

Custody of Infant.

Proceedings by habeas corpus to obtain custody of minor child are of an equitable nature in which courts are vested with a large measure of discretion, and may consider the best interests of the child and its wishes in the matter. *Andrino v. Yates*, 12 Idaho 618, 87 P. 787 (1906).

Right to the guardianship of an infant cannot be tried on habeas corpus. *Andrino v. Yates*, 12 Idaho 618, 87 P. 787 (1906).

Right of parent to the custody of infant may be presented and determined upon a habeas corpus proceeding. *Allen v. Williams*, 31 Idaho 309, 171 P. 493 (1918).

Habeas corpus proceedings by parents to regain custody of child committed by probate court to Idaho Industrial Training School held not a collateral attack on order of commitment. *Martin v. Vincent*, 34 Idaho 432, 201 P. 492 (1921).

Proceeding in habeas corpus to determine the right to the custody of a child is a proceeding of civil nature. *Mabbett v. Mabbett*, 34 Idaho 611, 202 P. 1057 (1921).

Where habeas corpus proceeding to determine right to custody of child is brought by husband against wife, husband may cross-examine wife as an adverse party under § 9-1206 (repealed), or he may examine her as his own witness. *Mabbett v. Mabbett*, 34 Idaho 611, 202 P. 1057 (1921).

In habeas corpus proceeding to determine custody of child, it is generally necessary that the actual as well as the legal situs of the child be within the same state as the court exercising jurisdiction. *Duryea v. Duryea*, 46 Idaho 512, 269 P. 987 (1928).

Plaintiff can't file petition for writ of habeas corpus to obtain custody of child, if he has possession of child. *Clemens v. Kinsley*, 72 Idaho 251, 239 P.2d 266 (1951).

Habeas corpus was the proper form for an action brought by child's natural mother to regain guardianship of child in custody of a nonrelative who had been brought to this state in violation of a valid California judgment and without the consent of the natural mother. *Mitchell v. Pincock*, 99 Idaho 56, 577 P.2d 343 (1978).

Grounds for Writ.

Improper conduct on part of the justice of the peace or of county attorney at a preliminary examination is not ground for habeas corpus unless it results in illegal restraint of

accused. In *re Green*, 7 Idaho 94, 60 P. 82 (1900).

In habeas corpus proceedings attacking a conviction for crime, unless the contrary appears in the record of the conviction, it will be conclusively presumed that the court had jurisdiction and that proceedings were regular and valid. In *re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

One held under process, duly and regularly issued by court of competent jurisdiction after extradition from a foreign state, will be remanded to custody notwithstanding alleged irregularity in the extradition proceedings. In *re Moyer*, 12 Idaho 250, 85 P. 897, 12 L.R.A. (n.s.) 227, 118 Am. St. R. 214, aff'd, 203 U.S. 221, 27 S. Ct. 121, 51 L. Ed. 160 (1960).

Under the circumstances where appellant had not been granted a preliminary hearing for 36 days nor allowed to contact his mother for over 30 days, it was incumbent on the trial court to have issued a writ of habeas corpus to inquire into the question of such imprisonment or restraint for full determination of the legality of his imprisonment or restraint in view of the constitutional guaranty of his right to a speedy and public trial. *Johnson v. State*, 85 Idaho 123, 376 P.2d 704 (1962).

One who is at liberty on his own recognition is not "restrained of his liberty" within the meaning of former § 19-4201 and may not use the writ to test the sufficiency of the evidence at his preliminary hearing to bind him over to the district court. In *re Carpenter*, 88 Idaho 567, 401 P.2d 800 (1965).

The failure of the trial court to inform the defendant upon arraignment that the court would appoint an attorney for him if he desired one and was financially unable to employ one cannot be construed as mere procedure within the rule that procedural defects are not subject to habeas corpus review. *Abercrombie v. State*, 91 Idaho 586, 428 P.2d 505 (1967).

The application for writ of habeas corpus did not show the petitioner to be unlawfully imprisoned or restrained in light of the established facts that he failed to file a tax return containing the required verification or certification and such failure to file a return with a proper verification or certification constituted a refusal and failure to obey a writ of mandate without just excuse and justified his imprisonment pursuant to § 7-314 until the writ was obeyed; accordingly, the application for a writ of habeas corpus would be denied and the writ would not issue. *Mitchell v. Agents of State*, 105 Idaho 419, 670 P.2d 520 (1983).

A writ of habeas corpus is not the remedy for the return of property of inmates, but the Court of Appeals and the lower courts possess jurisdiction to determine the property rights of inmates. *Sivak v. State*, 111 Idaho 118, 721 P.2d 218 (Ct. App. 1986).

Even assuming defendant had a substantive right to be in county jail instead of state prison, defendant was not denied the constitutional protections of due process. When defendant finally availed himself of the habeas corpus procedures, he received a speedy disposition of his case, and the allegedly unlawful nature of his confinement was cured. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Where an inmate's transfer to another prison is not properly executed, but is unreasonably delayed or simply not carried out, the inmate's remedy is to commence an administrative grievance procedure at the prison, or file a petition for habeas corpus relief. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Nature of Remedy.

Habeas corpus cannot be resorted to as an appellate remedy, or for purpose of reviewing or correcting errors. *In re Davis*, 23 Idaho 473, 130 P. 786 (1913).

Habeas corpus is a collateral remedy, and in assault upon judgment of court, nothing to the contrary appearing in record, it will be presumed that all proceedings were according to law. *Ex parte Allen*, 31 Idaho 295, 170 P. 921 (1918).

Where petitioner was convicted of burglary by a jury, the general doctrine prevails, that such remedy amounts to a collateral attack upon the judgment. *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

After conviction, qualifications of jurors cannot be reviewed in a habeas corpus proceeding, where the record of the conviction was regular on its face. *In re Blades*, 59 Idaho 682, 86 P.2d 737 (1939).

While the writ of habeas corpus is recognized in the Const., art. 1, Section 5, the post-conviction relief statute has been construed as "an expansion," not a limitation, on the writ of habeas corpus; therefore when a petitioner is challenging the validity of his conviction, the Idaho courts require use of the post-conviction petition and will not allow a proceeding in habeas corpus to raise those issues; therefore, the writ of habeas corpus remains for such issues as challenging the conditions of a prisoner's confinement, but not for contesting a conviction. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

Security for Costs.

A consideration of the history and purpose of the writ of habeas corpus leads irresistibly to the conclusion that a proceeding in habeas corpus is not, and was not intended to be, within the coverage of former § 12-116 (repealed) requiring nonresident plaintiffs to

give security for costs. *Cole v. Cole*, 68 Idaho 561, 201 P.2d 98 (1948).

Suspension of Habeas Corpus.

On application for habeas corpus, truth of recitals of alleged facts in a proclamation issued by the governor proclaiming county to be in a state of insurrection and rebellion will not be reviewed. *In re Boyle*, 6 Idaho 609, 57 P. 706, 45 L.R.A. 832, 96 Am. St. R. 286 (1899), appeal dismissed, 178 U.S. 611, 20 S. Ct. 1029, 44 L. Ed. 1215 (1900).

Collateral References. 39 Am. Jur. 2d, Habeas Corpus, § 1 et seq.

39, C.J.S., Habeas Corpus, § 1 et seq.

Nonresidence as affecting one's right to custody of child in habeas corpus proceedings. 15 A.L.R.2d 432.

Appeal, habeas corpus on ground of deprivation of right to. 19 A.L.R.2d 789.

Existence of other remedy as affecting habeas corpus on ground of restoration to sanity of one confined as an incompetent other than in connection with crime. 21 A.L.R.2d 1004.

Sexual psychopaths, habeas corpus to test validity of confinement under statutes relating to. 24 A.L.R.2d 350, 376.

Insanity of accused at time of commission of offense (not raised at trial) as ground for habeas corpus after conviction. 29 A.L.R.2d 703.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petitioner to bail. 56 A.L.R.2d 668.

Waiver or loss of accused's right to speedy trial as affecting right to habeas corpus. 57 A.L.R.2d 302, 339.

Right of prisoner held under extradition warrant to raise question of identity in habeas corpus proceeding. 93 A.L.R.2d 912, 916.

Attack, by petition for writ of habeas corpus, on personal service as having been obtained by fraud or trickery. 98 A.L.R.2d 551, 600.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus. 4 A.L.R.3d 1277.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 A.L.R.3d 764.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings. 33 A.L.R.3d 1443.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 A.L.R.3d 16.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — Modern cases. 26 A.L.R.4th 455.

19-4204. Application for writ of habeas corpus by a person not a prisoner. — (1) Application for a writ of habeas corpus by a person not a prisoner shall be made by filing a petition for writ of habeas corpus in the district court of the county in which the person is restrained.

(2) The petition must be verified by the oath or affirmation of the party applying for the writ and shall specify:

- (a) That the person is unlawfully restrained of his liberty;
- (b) The identity and address of the person restraining the subject of the petition;
- (c) The name and address of the place in which the person is restrained;
- (d) A description of the facts which make the restraint illegal; and
- (e) The theory of law upon which relief is sought, if known.

(3) Application under this section may be made by a guardian on behalf of a minor or by a guardian on behalf of an incapacitated person as defined in section 15-5-101, Idaho Code. [I.C., § 19-4204, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4204 was repealed. See Compiler's note, § 19-4201.

19-4205. Application for writ of habeas corpus by a prisoner. — (1) Application for a writ of habeas corpus by a prisoner shall be made by filing a petition for a writ of habeas corpus in the district court of the county in which the prisoner claims his confinement or aspects of his confinement violate provisions of the state or federal constitutions.

(2) With respect to a petition filed by an in-state prisoner, the petition must be verified by the oath or affirmation of the prisoner applying and shall specify that the prisoner is alleging state or federal constitutional violations concerning:

- (a) The conditions of his confinement;
- (b) The revocation of his parole;
- (c) Miscalculation of his sentence;
- (d) Loss of good time credits; or
- (e) A detainer lodged against him.

(3) With respect to a petition filed by an out-of-state prisoner, the petition must be verified by the oath or affirmation of the prisoner applying and shall specify that the prisoner is alleging state or federal constitutional violations concerning the conditions of his confinement, as provided in section 19-4203(3), Idaho Code.

(4) A petition filed by a prisoner under subsection (1), (2) or (3) of this section shall specify:

- (a) The identity and address of the person or officer whom the prisoner believes is responsible for the alleged state or federal constitutional violations, and shall name the persons identified individually as respondents;
- (b) The name, if any, and address of the place in which the prisoner is incarcerated;
- (c) The name and address of the place in which the prisoner claims the constitutional violation occurred;

(d) A short and plain statement of the facts underlying the alleged state or federal constitutional violation; and

(e) Whether the petitioner is an out-of-state prisoner.

(5) Neither the state of Idaho, any of its political subdivisions, or any of its agencies, nor any private correctional facility shall be named as respondents in a prisoner petition for writ of habeas corpus. [I.C., § 19-4205, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 3, p. 777.]

Compiler's notes. Former § 19-4205 was repealed. See Compiler's note, § 19-4201.

Section 2 of S.L. 2000, ch. 271 is compiled as § 19-4203.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

ANALYSIS

Dismissal of petition.

Liberty on own recognizance.

Party submitting application.

Unlawfully imprisoned or restrained.

Unverified petition.

Verification.

Violation of prison rule.

Dismissal of Petition.

In a proper case, a judge may dismiss a habeas corpus petition for lack of verification, or may grant the state's motion to dismiss on like grounds if timely made; caution should be exercised, however, to insure that such a dismissal does not deny the constitutional protection of habeas corpus to an individual with a legitimate grievance on purely technical grounds. *Freeman v. State, Dep't of Cors.*, 116 Idaho 985, 783 P.2d 324 (Ct. App. 1989).

Liberty on Own Recognizance.

One who is at liberty on his own recognizance is not "restrained of his liberty" within the meaning of this section and may not use the writ to test the sufficiency of the evidence at his preliminary hearing to bind him over to the district court. *In re Carpenter*, 88 Idaho 567, 401 P.2d 800 (1965).

Party Submitting Application.

An application for a writ of habeas corpus does not have to be submitted specifically by the aggrieved party. *State v. Harrold*, 113 Idaho 938, 750 P.2d 959 (Ct. App.), cert. denied, 116 Idaho 467, 776 P.2d 829 (1988).

Unlawfully Imprisoned or Restrained.

The application for writ of habeas corpus did not show the petitioner to be unlawfully imprisoned or restrained in light of the established facts that he failed to file a tax return containing the required verification or certification and such failure to file a return with a

proper verification or certification constituted a refusal and failure to obey a writ of mandate without just excuse and justified his imprisonment pursuant to § 7-314 until the writ was obeyed; accordingly, the application for a writ of habeas corpus would be denied and the writ would not issue. *Mitchell v. Agents of State*, 105 Idaho 419, 670 P.2d 520 (1983).

Unverified Petition.

When a trial court receives an unverified petition, rather than dismissing the petition outright, sua sponte, it would be a better practice for the court to give notice of its intended dismissal, providing an opportunity for cure, as is required by § 19-4906(b) in the case of a petition for post-conviction relief. *Freeman v. State, Dep't of Cors.*, 116 Idaho 985, 783 P.2d 324 (Ct. App. 1989).

Verification.

Verification of a petition for habeas corpus is not a jurisdictional requisite, without which the court is powerless to grant any relief; rather, verification is a procedural requirement which may be waived if not timely noted by the trial court or raised as a defense by the respondent. *Freeman v. State, Dep't of Cors.*, 116 Idaho 985, 783 P.2d 324 (Ct. App. 1989).

Violation of Prison Rule.

Trial court did not err in granting a motion for summary judgment in a case involving a petition for a writ of habeas corpus because appellant was unable to show that any substantive due process rights were violated when appellant was disciplined under a prison rule; the rule prohibiting prisoners from being in unauthorized places was sufficiently explicit to inform appellant that disciplinary action could have been taken when appellant decided to eat breakfast a second time rather than report to work. *Nelson v. Hayden*, 138 Idaho 619, 67 P.3d 98 (Ct. App. 2003).

Collateral References. Attorney's fees awards under § 803(d) of Prison Litigation Reform Act (42 U.S.C. § 1997e(d)). 165 A.L.R. Fed. 551.

19-4206. Prisoners required to exhaust administrative remedies in conditions of confinement cases. — (1) Unless a petitioner who is a

prisoner establishes to the satisfaction of the court that he is in imminent danger of serious physical injury, no petition for writ of habeas corpus or any other civil action shall be brought by any person confined in a state or county institution, or in a state, local or private correctional facility, with respect to conditions of confinement until all available administrative remedies have been exhausted. If the institution, or state, local or private correctional facility does not have a system for administrative remedy, this requirement shall be waived.

(2) At the time of filing, the petitioner shall submit, together with the petition for writ of habeas corpus a true, correct and complete copy of any documentation which demonstrates that he has exhausted administrative remedies described in subsection (1) of this section.

(3) If at the time of filing the petition for writ of habeas corpus the petitioner fails to comply with this section, the court shall dismiss the petition with or without prejudice. [I.C., § 19-4206, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 4, p. 777.]

Compiler’s notes. Former § 19-4206 was repealed. See Compiler’s note, § 19-4201.
Section 5 of S.L. 2000, ch. 271 is compiled as § 19-4209.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4207. Application for writ of habeas corpus on behalf of another. — A petition for writ of habeas corpus may only be filed by a person described in section 19-4203, Idaho Code, or his attorney, except that a petition may be filed on behalf of an aggrieved person who is a minor, or on behalf of a person who is incapacitated as defined by section 15-5-101, Idaho Code, by the aggrieved person’s legal guardian. [I.C., § 19-4207, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler’s notes. Former § 19-4207 was repealed. See Compiler’s note, § 19-4201.

Sec. to sec. ref. This section is referred to in § 19-4211.

19-4208. General procedures governing habeas corpus proceedings. — A habeas corpus proceeding is a civil action and is governed by the provisions of this chapter and the Idaho court rules to the extent that such rules are not inconsistent with this act. [I.C., § 19-4208, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler’s notes. The words “this act” refer to S.L. 1999, ch. 376, which is compiled as §§ 19-4201 through 19-4226.
Former § 19-4208 was repealed. See Compiler’s note, § 19-4201.

right of mandatory counsel in habeas corpus proceedings. *Quinlan v. Idaho Comm’n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

Counsel.

Prison inmates do not have a statutory

19-4209. Procedures governing prisoner habeas corpus proceedings. — (1) The court may dismiss with prejudice a petition for writ of habeas corpus under this section, in whole or in part, prior to service of the petition on the respondent, if the court finds:

- (a) The petition is frivolous as defined in section 12-122, Idaho Code;
- (b) The petition has been brought maliciously or solely to harass;
- (c) The petition fails to state a claim of constitutional violation upon which relief can be granted;
- (d) The alleged constitutional deprivation is de minimis in nature; or
- (e) The relief sought is monetary damages or the return of property.

(2) If the court finds that the petition should not be dismissed, then:

- (a) The court shall mail a copy of the petition and order of response to the respondent or the respondent's counsel, if known;
- (b) A response must be filed within thirty (30) days from the date the respondent or the respondent's counsel is served with the petition and order for response. If the court finds that exigent circumstances exist which warrant an earlier response, the court shall set forth those circumstances and the allowed time for response; and
- (c) If the court dismisses the petition in part, the court may specify which issues and/or allegations remain at issue for response.

(3) If the court orders a response to a petition for writ of habeas corpus under this section, the respondent may file any responsive motion or pleading allowed by Idaho rules of civil procedure.

(4) Upon the filing of a responsive motion or pleading, a prisoner may file a reply to the response or the court may order a reply to the response on its own motion. The court should consider any reply filed only to the extent it is relevant to the issues and allegations raised in the original petition for writ of habeas corpus.

(5) With respect to a petition filed by an in-state prisoner the court should not grant a writ of habeas corpus or order an evidentiary hearing under this section unless, after reviewing the petition for writ of habeas corpus, the response and the reply, if any, the court finds that the prisoner's state or federal constitutional rights may have been violated relative to:

- (a) Conditions of confinement;
- (b) Revocation of parole;
- (c) Miscalculation of his sentence;
- (d) Loss of good time credits; or
- (e) A detainer lodged against him.

If, after review under this subsection, the court finds that the allegations do not state a state or federal constitutional claim, the court may dismiss the petition without a hearing.

(6) With respect to a petition filed by an out-of-state prisoner, the court should not grant a writ of habeas corpus or order an evidentiary hearing under this section unless, after reviewing the petition for writ of habeas corpus, the response and the reply, if any, the court finds that the out-of-state prisoner's state or federal constitutional rights may have been violated relative to the out-of-state prisoner's conditions of confinement. If, after review under this subsection, the court finds that the allegations do not state a state or federal constitutional claim, the court may dismiss the petition without a hearing.

(7) If the court issues a writ of habeas corpus and sets the matter for evidentiary hearing, the following shall apply:

- (a) The hearing shall be set as expeditiously as possible and may be at a place convenient for the court and the parties, including the institution or the state, local or private correctional facility where the prisoner is confined;
- (b) The burden of proof during an evidentiary hearing pursuant to a petition for writ of habeas corpus lies with the prisoner; and
- (c) As soon as possible after the conclusion of the hearing, the court shall enter its findings of fact and conclusions of law, and either dismiss the petition in part or in its entirety, or grant injunctive relief consistent with this act. [I.C., § 19-4209, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 5, p. 777.]

Compiler's notes. The words "this act" refer to S.L. 1999, ch. 376, which is compiled as §§ 19-4201 through 19-4226.

Former § 19-4209 was repealed. See Compiler's note, § 19-4201.

Sections 4 and 6 of S.L. 2000, ch. 271 are

compiled as §§ 19-4206 and 19-4211, respectively.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in §§ 19-4216 and 19-4221.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Attendance of witnesses.
Necessary witnesses.
Recommitment.

Attendance of Witnesses.

Because a habeas corpus proceeding is civil rather than criminal, it is not subject to the same rules of compulsory process which apply as a matter of constitutional law to criminal trials; rather, the right to secure attendance of witnesses is grounded in the habeas corpus statutes, particularly this section, and in I.R.C.P. 45. *Sivak v. State*, 114 Idaho 271, 755 P.2d 1309 (Ct. App. 1988).

In a habeas corpus proceeding in which an inmate challenged the conditions of his confinement, the magistrate did not err in failing to deem the witness "necessary" where the inmate made no offer of proof that the witness knew what food the inmate was personally served, nor that any difference between the official menu and food served had a significant bearing on nutrition. *Sivak v. State*, 114 Idaho 271, 755 P.2d 1309 (Ct. App. 1988).

Necessary Witnesses.

The Civil Rules, together with the habeas corpus statutes, provide to a petitioner the right to obtain the testimony of "necessary" witnesses. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

To establish that a witness is "necessary,"

the petitioner must show that the witness' testimony would be relevant to a material issue and that it would bear sufficient weight on that issue. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Magistrate did not err in concluding that a witness was unnecessary to a habeas corpus proceeding where the witness' testimony clearly would not bear significant weight on the question of whether jail staff intentionally interfered with petitioner's medical treatment, or on the ultimate issue of cruel and unusual punishment. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

Magistrate correctly concluded that certain witnesses which the petitioner in a habeas corpus desired to subpoena would have provided only redundant, immaterial, irrelevant, or cumulative testimony as to the issues which the petitions for writs of habeas corpus properly placed before the magistrate; such witnesses were not "necessary" under this section, and the magistrate did not err in refusing to subpoena them. *Sivak v. State*, 119 Idaho 211, 804 P.2d 940 (Ct. App. 1991).

Recommitment.

Fact that petitioner in habeas corpus proceeding, committed for inebriation, had been released from previous commitment for same cause will not justify his release from second commitment. *Ex parte Tierney*, 51 Idaho 279, 5 P.2d 539 (1931).

19-4210. Discovery in habeas corpus proceedings. — (1) Discovery shall not ordinarily be permitted in habeas corpus cases.

(2) No discovery shall be permitted if the issues raised by the petition, the response or reply are wholly legal in nature.

(3) If factual issues are raised by the pleadings, the court may, upon motion, grant leave for discovery in accordance with Idaho rules of civil procedure.

(a) The party must file a motion for leave to conduct discovery, attaching a copy of the discovery sought.

(b) If the court finds that discovery is necessary to protect or defend a substantive state or federal constitutional right at issue, it shall enter an order tailored to allow discovery for that limited purpose. [I.C., § 19-4210, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4210 was repealed. See Compiler's note, § 19-4201.

19-4211. Issuance of writ of habeas corpus. — (1) Any court authorized under section 19-4202, Idaho Code, may grant a writ of habeas corpus pursuant to a petition filed by, or, pursuant to section 19-4207, Idaho Code, on behalf of a person not a prisoner if it finds that the restraint of the person's liberty is illegal.

(2) Any court authorized under section 19-4202, Idaho Code, may grant a writ of habeas corpus and order a hearing pursuant to a petition filed by a prisoner, or, pursuant to section 19-4207, Idaho Code, on behalf of a prisoner when:

(a) The court has considered the factual allegations contained in the petition together with any responsive pleading filed by the respondent, and a reply filed by the prisoner, if any;

(b) The court finds that the petitioner is likely to prevail on the merits of his state or federal constitutional challenge;

(c) The court finds that the petitioner will suffer irreparable injury if some relief is not granted;

(d) The court finds that the balance of potential harm to the petitioner substantially outweighs any legitimate governmental interest; and

(e) The court finds that equity favors granting relief to the petitioner.

(3) Any order granting the writ should issue without delay and a hearing should be scheduled. The court may provide a statement of the issues to be addressed, and whether evidence will be accepted.

(4) If a court issues an order granting the writ and setting the matter for hearing, the court may set the hearing at the state, local or private correctional facility or other appropriate place. [I.C., § 19-4211, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 6, p. 777.]

Compiler's notes. Former § 19-4211 was repealed. See Compiler's note, § 19-4201.

Sections 5 and 7 of S.L. 2000, ch. 271 are compiled as §§ 19-4209 and 19-4213, respectively.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

DECISIONS UNDER PRIOR LAW

ANALYSIS

Advising as to sentence.
Collateral legal consequences.
Excessive imprisonment.
Grounds for writ.
Imprisonment justified.
Insufficiency of preliminary examination.
Magistrates.
Petition for writ.
Reasonable or probable cause.
When writ not issued.
Writ granted conditionally.

Advising as to Sentence.

The trial judge on a criminal complaint charging appellant with robbery was not required to advise appellant what sentence could or would be pronounced if a conviction were had on a plea of guilty, or otherwise. *Cobas v. Clapp*, 79 Idaho 419, 319 P.2d 475, cert. denied, 356 U.S. 941, 78 S. Ct. 785, 2 L. Ed. 2d 816 (1958).

Collateral Legal Consequences.

Even though a term of imprisonment was served under unlawful conditions, where conviction itself is not being attacked or the former unlawful conditions of confinement carry no collateral legal consequences, the controversy will be considered moot; however, where the unlawful conditions of detention have ended, but there are collateral legal consequences that the former prisoner seeks to avoid, the issues are not moot and should be adjudicated by the courts. *Russell v. Fortney*, 111 Idaho 181, 722 P.2d 490 (Ct. App. 1986).

Where the defendant did not contend that his conviction ought to be set aside or that he ought to be set free from his present confinement with the Board of Correction as a result of the alleged conditions of detention, and he did not show that there were any collateral legal consequences flowing from the former detention, his habeas corpus petition was moot. *Russell v. Fortney*, 111 Idaho 181, 722 P.2d 490 (Ct. App. 1986).

Excessive Imprisonment.

Prisoner sentenced to five years' imprisonment under a statute authorizing a maximum penalty of two years is entitled to release on habeas corpus. *Ex parte Cox*, 3 Idaho 530, 32 P. 197, 95 Am. St. R. 29 (1893).

Though defendant is sentenced under the wrong section of the statute, he cannot be discharged on habeas corpus until he has performed so much of the sentence as was within the power of court to impose. *In re Chase*, 18 Idaho 561, 110 P. 1036 (1910).

Where inebriate ordered confined to asylum

for 45 days was released pending appeal, and abstained from the use of intoxicants for more than 15 months, upon his rearrest it appearing that the term of his confinement had long since expired, that he has regained the power of self control and is not an inebriate, and that the reasons that would justify his commitment no longer exist, he is entitled to his freedom and should be discharged from custody. *In re Noble*, 53 Idaho 211, 22 P.2d 873 (1933).

Grounds for Writ.

Writ of habeas corpus can not be substituted for writ of error and will not lie to discharge prisoner on ground that the information filed against him is technically defective. *In re Marshall*, 6 Idaho 516, 56 P. 470 (1899).

One convicted of crime is not entitled to discharge on habeas corpus because county attorney was given leave, after a demurrer to the information was sustained, to file a new information, instead of being specifically directed to do so. *In re Pierce*, 8 Idaho 183, 67 P. 316 (1902).

Imprisonment Justified.

The application for writ of habeas corpus did not show the petitioner to be unlawfully imprisoned or restrained in light of the established facts that he failed to file a tax return containing the required verification or certification and such failure to file a return with a proper verification or certification constituted a refusal and failure to obey a writ of mandate without just excuse and justified his imprisonment pursuant to § 7-314 until the writ was obeyed; accordingly, the application for a writ of habeas corpus would be denied and the writ would not issue. *Mitchell v. Agents of State*, 105 Idaho 419, 670 P.2d 520 (1983).

Insufficiency of Preliminary Examination.

Prisoner will not be discharged on habeas corpus where depositions establish that a crime has been committed, and the probability of prisoner's being guilty thereof sufficiently appears in depositions to warrant magistrate to hold prisoner. *In re Levy*, 8 Idaho 53, 66 P. 806 (1901).

After a judgment of conviction, court can not examine on an application for habeas corpus the evidence taken upon the preliminary examination of accused to ascertain whether it discloses the commission of an offense by accused. *In re Knudtson*, 10 Idaho 676, 79 P. 641 (1905).

Supreme Court can not, on habeas corpus, weigh the evidence taken at the preliminary examination, but if it wholly fails to disclose a

public offense for which prisoner may be held, then petitioner is entitled to his discharge. In *re* Knudtson, 10 Idaho 676, 79 P. 641 (1905); In *re* Heigho, 18 Idaho 566, 110 P. 1029, 32 L.R.A. (n.s.) 877, Ann. Cas. 1912A, 138 (1910).

Where the evidence upon which a defendant was bound over to the district court on a charge of first degree murder showed beyond question defendant had shot the victim but the fact that he was intoxicated and the spontaneity with which it happened cast doubt on its being premeditated, such doubt did not entitle defendant to discharge in a habeas corpus proceeding. *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967).

Magistrates.

A magistrate's discretion in ordering commitment should not be disturbed except in clear cases of abuse. *State v. O'Bryan*, 96 Idaho 548, 531 P.2d 1193 (1975).

Petition for Writ.

The petition may be informal; the sufficiency of the manner employed to state the facts upon which the applicant relies is for decision solely by the judge to whom the petition is presented; when the writ has been issued, the petition has fully served its purpose, it is not one of the pleadings by which the issues between the parties are fixed. *Cole v. Cole*, 68 Idaho 561, 201 P.2d 98 (1948).

Where a petition in a habeas corpus proceeding alleged that the district court of Utah in granting a divorce had awarded custody of minor children to the mother and that the father continued to unlawfully detain them but failed to properly plead the jurisdiction of the Utah court, still the facts pleaded, albeit defective, were sufficient to authorize issuance of the writ. *Cole v. Cole*, 68 Idaho 561, 201 P.2d 98 (1948).

The function of the petition for a writ of habeas corpus is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. While the writ requires a return, yet to such return petitioner may present exceptions, raising questions of law or a traverse, raising issues of fact or both, and where this course is followed, respondent is not required to file, in addition to the return, a pleading specifically denying the petition's affirmative allegations, treated as a traverse, nor does it shift the burden of proof as to such allegations from petitioner to respondent. *Cole v. Cole*, 68 Idaho 561, 201 P.2d 98 (1948).

Reasonable or Probable Cause.

In preliminary examination, the state is not required to establish the guilt of petitioner beyond a reasonable doubt, and the phrase

"reasonable or probable cause" is not equivalent to the phrase "beyond a reasonable doubt." By "reasonable or probable cause" is meant such evidence as would lead a reasonable person to believe that accused party has probably or likely committed the offense charged. In *re* Squires, 13 Idaho 624, 92 P. 754 (1907).

It is not necessary for committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof. *State v. Layman*, 22 Idaho 387, 125 P. 1042 (1912).

The correct procedure for determining whether the evidence wholly fails to disclose a public offense for which a prisoner may be held on preliminary examination is by a writ of habeas corpus. *State v. Bauman*, 89 Idaho 519, 406 P.2d 810 (1965).

Evidence that an ambulance driver and captain of detectives summoned to a house found a mother holding her dead child, that an autopsy showed the child to be bruised about the trunk, both front and back, and the top of his liver torn off, and that the accused stated to the sheriff that he had kicked the child was sufficient to hold the accused to answer a charge of second degree murder. *Martinez v. State*, 90 Idaho 229, 409 P.2d 426 (1965).

If a defendant believed the evidence at his trial was insufficient to establish the corpus delicti, his remedy was by appeal and not by writ of habeas corpus. *Stokes v. State*, 90 Idaho 339, 411 P.2d 392 (1966).

When Writ Not Issued.

Writ will not issue on behalf of one accused of felony pending a preliminary examination, where petition fails to state facts showing committing magistrate is without jurisdiction. In *re* Green, 7 Idaho 94, 60 P. 82 (1900).

Application for writ of habeas corpus should be denied where it is not shown that committing magistrate has abused the discretion which the law vests in him. In *re* Levy, 8 Idaho 53, 66 P. 806 (1901); In *re* Squires, 13 Idaho 624, 92 P. 754 (1907).

Habeas corpus will not lie after citation for contempt until defendant has actually suffered imprisonment. *Evans v. District Court*, 47 Idaho 267, 275 P. 99 (1929).

Writ Granted Conditionally.

Where defendant was charged with murder, and was found guilty of an assault with a deadly weapon under an information which did not charge an assault, the writ was conditionally granted, provided prosecuting attorney failed to file a complaint against defendant within five days. In *re* McLeod, 23 Idaho 257, 128 P. 1106, 43 L.R.A. (n.s.) 813 (1913).

19-4212. Injunctive relief available to a person not a prisoner. — If a court finds that a person not a prisoner is being illegally restrained, the court may fashion appropriate injunctive relief to cure the illegality, including release. [I.C., § 19-4212, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4212 was repealed. See Compiler's note, § 19-4201.

19-4213. Relief available for constitutional violations during the course of revocation of parole. — (1) If a court finds that an in-state prisoner's constitutional rights have been violated during the course of revocation of his parole, the court may, upon specific findings of fact and conclusions of law, enter an order directing that the parole revocation proceedings be reconvened. The order shall identify the constitutional violation which occurred and direct that the violation be cured.

(2) The Idaho commission for pardons and parole has the exclusive authority to order release of an in-state prisoner on parole pursuant to sections 20-210 and 20-223, Idaho Code. [I.C., § 19-4213, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 7, p. 777.]

Compiler's notes. Former § 19-4213 was repealed. See Compiler's note, § 19-4201. Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

Section 6 of S.L. 2000, ch. 271 is compiled as § 19-4211.

19-4214. Relief available for miscalculation of sentence. — (1) If, upon findings of fact and conclusions of law, a court finds that an in-state prisoner's sentence has been miscalculated, the court may order the sentence to be recalculated consistent with the court's findings and conclusions.

(2) The court may order the prisoner released under this section only if the prisoner would be entitled to release due to expiration of his sentence correctly calculated. [I.C., § 19-4214, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 8, p. 777.]

Compiler's notes. Former § 19-4214 was repealed. See Compiler's note, § 19-4201. Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4215. Relief available for loss of good time credits. — (1) If the court finds that an in-state prisoner has lost good time credits without constitutionally sufficient due process, the court may order a rehearing by the correctional facility authority.

- (2) Any court order requiring rehearing shall specify:
 - (a) How due process was constitutionally insufficient and direct that the insufficiency be cured; and
 - (b) Provide that the officials of the correctional facility shall have not less than thirty (30) days in which to convene the rehearing.
- (3) The correctional facility authority shall have the responsibility for the recalculation and restoration of good time credits. If good time credits are restored to the petitioner as a result of the rehearing, and restoration of

good time credits entitles the petitioner to release, he shall be so released. [I.C., § 19-4215, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 9, p. 777.]

Compiler's notes. Former § 19-4215 was repealed. See Compiler's note, § 19-4201.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4216. Relief available for detainees. — (1) An in-state prisoner may petition for writ of habeas corpus to challenge the legality of a detainer which has been lodged against him by another state under the interstate agreement on detainees, chapter 50, title 19, Idaho Code.

(2) The court may set a hearing on a petition for writ of habeas corpus to inquire into factual issues involving the legality of the detainer or the legality of delivery of the prisoner to the prosecuting state under the detainer. However, if the petition involves legal issues only, the court shall decide the matter without hearing consistent with section 19-4209, Idaho Code. [I.C., § 19-4216, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 10, p. 777.]

Compiler's notes. Former § 19-4216 was repealed. See Compiler's note, § 19-4201.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4217. Injunctive relief available to prisoners and other institutionalized persons in conditions of confinement cases. — (1) If the court finds that a prisoner's or other institutionalized person's constitutional rights have been violated involving conditions of confinement, the court may order injunctive relief consistent with and subject to the limitations set forth in this chapter.

(2) If the court concludes that injunctive relief is necessary to cure unconstitutional conditions of confinement, the court shall enter an order subject to the following limitations:

- (a) Any order for injunctive relief shall be accompanied by specific findings of fact and conclusions of law;
- (b) Injunctive relief shall be narrowly drawn and extend no further than necessary to correct the violation of the constitutional right;
- (c) Injunctive relief must be the least intrusive means necessary to correct the constitutional violation;
- (d) The court shall give substantial weight to any adverse impact on public safety;
- (e) The court shall give substantial deference to the discretion of administrators of the institution or the state, local or private correctional facility;
- (f) The administrator of the institution, or of the state, local or private correctional facility shall be given all reasonable opportunities to correct state or federal constitutional errors made in the internal operations of the institution and shall be charged with the task of devising constitutionally sound modifications to their operations. [I.C., § 19-4217, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 11, p. 777.]

Compiler's notes. Former § 19-4217 was repealed. See Compiler's note, § 19-4201.
 Section 12 of S.L. 2000, ch. 271 is compiled as § 19-4219.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.
Sec. to sec. ref. This section is referred to in § 19-4220.

19-4218. Termination of injunctive relief order or decree in conditions of confinement cases. — In any civil action with respect to conditions of confinement in which prospective relief is ordered or obtained pursuant to consent decree, the relief order or decree shall be terminated upon the motion of any party or intervenor:

- (1) Two (2) years after the date the court granted or approved the prospective relief;
- (2) One (1) year after the date the court has entered an order or decree denying termination of prospective relief under this section; or
- (3) In the case of an order issued on or before the date of enactment of this act, one (1) year after such date of enactment. [I.C., § 19-4218, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4218 was repealed. See Compiler's note, § 19-4201.

Sec. to sec. ref. This section is referred to in § 19-4220.

19-4219. Immediate termination of order or decree for prospective relief in conditions of confinement cases. — (1) In any civil action with respect to conditions of confinement, the administrator of the institution, or of the state, local or private correctional facility, or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of an express finding by the court that the relief:

- (a) Is narrowly drawn;
- (b) Extends no further than necessary to correct the violation of the constitutional right; and
- (c) Is the least intrusive means necessary to correct the violation of the constitutional right.
- (2) Prospective relief shall not terminate if the court makes written findings based on the record that the prospective relief:
 - (a) Remains necessary to correct a current or ongoing violation of the constitutional right;
 - (b) Extends no further than necessary to correct the violation of the constitutional right;
 - (c) Is narrowly drawn; and
 - (d) Is the least intrusive means to correct the violation.
- (3) Nothing in this section shall prevent the administrator of the institution, or of the state, local or private correctional facility, or intervenor from seeking modification or termination before the relief is terminable under subsection (1) or (2) of this section to the extent that modification or termination would otherwise be legally permissible. [I.C., § 19-4219, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 12, p. 777.]

Compiler's notes. Former § 19-4219 was repealed. See Compiler's note, § 19-4201.

Sections 11 and 13 of S.L. 2000, ch. 271 are compiled as §§ 19-4217 and 19-4221, respectively.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in § 19-4220.

19-4220. Settlements and consent decrees in conditions of confinement cases. — (1) In any civil action with respect to conditions of confinement, the court shall not enter or approve a settlement or consent decree unless it complies with the limitations on relief set forth in section 19-4217, Idaho Code.

(2) This section, together with sections 19-4217, 19-4218 and 19-4219, Idaho Code, applies to all settlements or consent decrees in effect at the time of passage of this act. Any settlement or consent decree entered into before enactment of this act shall not be construed as a waiver of the application of this section by any party to the settlement or consent decree, and may be terminated consistent with sections 19-4218 and 19-4219, Idaho Code. [I.C., § 19-4220, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4220 was repealed. See Compiler's note, § 19-4201.

19-4221. Successive claims. — In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding if the prisoner has, on two (2) or more prior occasions, while incarcerated or detained in any state, local or private correctional facility, brought an action or appeal in a court of this state that was dismissed on any ground set forth in section 19-4209(1)(a) through (d), Idaho Code, unless:

(1) The prisoner first obtains leave from the district court having jurisdiction over the case; or

(2) The prisoner's action or petition is submitted for filing by an attorney licensed to practice law in the state of Idaho. [I.C., § 19-4221, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 13, p. 777.]

Compiler's notes. Former § 19-4221 was repealed. See Compiler's note, § 19-4201.

Section 12 of S.L. 2000, ch. 271 is compiled as § 19-4219.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4222. Prior showing of physical injury or mental illness required. — No civil action may be brought by a prisoner confined in a state, local or private correctional facility for mental or emotional injury suffered while in custody without a prior showing of either:

(1) Physical injury; or

(2) Diagnosed severe and disabling mental illness. [I.C., § 19-4222, as added by 1999, ch. 376, § 2, p. 1026; am. 2000, ch. 271, § 14, p. 777.]

Compiler's notes. Former § 19-4222 was repealed. See Compiler's note, § 19-4201.

Section 15 of S.L. 2000, ch. 271 declared an emergency. Approved April 12, 2000.

19-4223. Right of access to court not expanded. — Nothing in this chapter shall be construed to expand the right of access to courts for institutionalized persons under federal or state law. [I.C., § 19-4223, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4223 was repealed. See Compiler's note, § 19-4201.

19-4224. Exclusive remedy. — This chapter sets forth the exclusive procedures and remedies in habeas corpus actions. [I.C., § 19-4224, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4224 was repealed. See Compiler's note, § 19-4201.

habeas petitioner's request for counsel. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

Counsel.

Magistrate judge was correct in denying a

19-4225. Liberty interest not created. — Nothing in this chapter shall be construed to create a liberty interest. [I.C., § 19-4225, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. Former § 19-4225 was repealed. See Compiler's note, § 19-4201.

19-4226. Severability. — The provisions of this act are declared to be severable and if any provision of this act or the application of a provision to any person or circumstance is declared invalid for any reason, the declaration shall not affect the validity of the remaining portions of this act. [I.C., § 19-4226, as added by 1999, ch. 376, § 2, p. 1026.]

Compiler's notes. The words "this act" refer to S.L. 1999, ch. 376, which is compiled as §§ 19-4201 through 19-4226.

Former § 19-4226 was repealed. See Compiler's note, § 19-4201.

19-4227 — 19-4236. Execution of warrants — Return — Discharge — Issuance of writs, warrants, process, subpoenas — Refusal or disregard of writ — Commitment after discharge of habeas corpus — Concealment of person entitled to habeas corpus. [Repealed.]

Compiler's notes. Former §§ 19-4227 — 19-4236 were repealed. See Compiler's note, § 19-4201.

CHAPTER 43

CORONER'S INQUESTS

SECTION.

19-4301. Coroner to investigate deaths.
19-4301A. Deaths to be reported to law enforcement officials and coroner.

SECTION.

19-4301B. Performance of autopsies.
19-4301C. Release of body.
19-4301D. Coroner to make reports.
19-4302. Jurors to be sworn.

SECTION.

- 19-4303. Examination of witnesses.
 19-4304. Compelling attendance of witnesses.
 19-4305. Verdict of jury.
 19-4306. Reduction of testimony to writing.

SECTION.

- 19-4307. Transmission of testimony to magistrate.
 19-4308. Warrant for arrest of accused.
 19-4309. Form of warrant.
 19-4310. Service of warrant.

19-4301. Coroner to investigate deaths. — When a coroner is informed that a person in his county has died:

(a) As a result of violence whether apparently homicidal, suicidal or accidental, or

(b) Under suspicious or unknown circumstances, or

(c) When not attended by a physician during his last illness and the cause of death cannot be certified by a physician, the coroner must refer the investigation of the death to the sheriff of the county or the chief of police of the city in which the incident causing death occurred; or, if unknown, then in which the death occurred; or, if unknown, then in which the body is found. The investigation shall be the responsibility of said officer who, upon completion of his investigation, shall furnish a written report of the result of such investigation to said coroner. The coroner of said county must refer said case to the coroner of the county in which the incident causing death occurred, if known, or if unknown, then in which the death occurred, if known, to hold an inquest. Provided, however, that a coroner shall conduct an inquest only if he has reasonable grounds to believe that the death has occurred under any of the circumstances heretofore stated in sections 19-4301(a) or 19-4301(b), Idaho Code. If so, he may summon six (6) persons qualified by law to serve as jurors to appear before him to hold said inquest.

Nothing in this section shall be construed to affect the tenets of any church or religious belief. [I.C., § 19-4301, as added by 1961, ch. 262, § 2, p. 459; am. 1963, ch. 4, § 1, p. 8.]

Compiler's notes. Former section 19-4301 which comprised 1864, p. 475, § 134; R.S., R.C., & C.L., § 8377; C.S., § 9309; I.C.A., § 19-4401 was repealed by S.L. 1961, ch. 263, § 1.

Cross ref. Disposal of money or property found on dead body, § 31-2117.

Burial of unclaimed bodies after inquest, § 31-2802.

Disposal of property found on corpse, § 31-2803.

District judge to act as coroner when office vacant, § 31-2805.

Impaneling of juries of inquest, § 2-508.

Jury of inquest defined, § 2-106.

Payment to legal representative of deceased, § 31-2118.

Sec. to sec. ref. This chapter is referred to in § 39-268.

This section is referred to in § 19-4301A.

Cited in: *Haman v. Prudential Ins. Co.*, 91 Idaho 19, 415 P.2d 305 (1966); *Hagy v. State*, 137 Idaho 618, 51 P.3d 432 (Ct. App. 2002).

ANALYSIS

Admissibility of results and records.

Failure to hold inquest.

Physician's fee.

Preliminary examination.

Admissibility of Results and Records.

Where the coroner's inquest, a public meeting, as well as the results and records of the investigation were a matter of public record, the results of the blood-alcohol test on the accident victim which would necessarily be a part of the coroner's report as well as a significant issue at the inquest, were admissible at the wrongful death trial. *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986).

Failure to Hold Inquest.

Failure of coroner to hold an inquest is not ground for the release of a person charged with the murder of deceased. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

Physician's Fee.

Coroner is not authorized to make contract as to sum county shall pay physician subpoenaed to examine body of deceased person. *Fairchild v. Ada County*, 6 Idaho 340, 55 P. 654 (1898).

Preliminary Examination.

Coroner is not a magistrate, and has no authority to hold a preliminary examination. He is not a judicial officer. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

Inquisition of coroner is not a sufficient basis for an information by public prosecutor. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

Collateral References. 18 Am. Jur. 2d, Coroners or Medical Examiners, §§ 7-17.

18 C.J.S., Coroners and Medical Examiners, §§ 10-26.

Reviewing, setting aside, or quashing of verdict at coroner's inquest. 78 A.L.R.2d 1218.

19-4301A. Deaths to be reported to law enforcement officials and coroner. — Where any death occurs which is subject to investigation by the coroner under section 19-4301, Idaho Code, the person who finds or has custody of the body shall promptly notify the coroner who shall notify the appropriate law enforcement agency. Pending arrival of the law enforcement officers the person finding or having custody of the body shall take reasonable precautions to preserve the body and body fluids and the scene of the event shall not be disturbed by anyone until authorization is given by the law enforcement officer conducting the investigation. [I.C., § 19-4301A, as added by 1961, ch. 262, § 3, p. 459.]

Cited in: *Haman v. Prudential Ins. Co.*, 91 Idaho 19, 415 P.2d 305 (1966).

19-4301B. Performance of autopsies. — The coroner may, in the performance of his duties under this chapter, summon a person authorized to practice medicine and surgery in the state of Idaho to inspect the body and give a professional opinion as to the cause of death. The coroner or the prosecuting attorney may order an autopsy performed if it is deemed necessary accurately and scientifically to determine the cause of death. When an autopsy has been performed, pursuant to an order of a coroner or a prosecuting attorney, no cause of action shall lie against any person, firm or corporation for participating in or requesting such autopsy. [I.C., § 19-4301B, as added by 1961, ch. 262, § 4, p. 459.]

Cited in: *Haman v. Prudential Ins. Co.*, 91 Idaho 19, 415 P.2d 305 (1966); *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986).

Collateral References. Civil liability in conjunction with autopsy. 97 A.L.R.5th 419.

19-4301C. Release of body. — Where a body is held for investigation or autopsy under this act the coroner shall, if requested by next of kin, release the body for funeral preparation not later than 24 hours after death or discovery of the body, whichever is later. Any district judge may ex parte order the 24 hour period extended upon a showing of reasonable cause by the prosecuting attorney by petition supported by affidavit. [I.C., § 19-4301C, as added by 1961, ch. 262, § 5, p. 459.]

Compiler's notes. The words "this act" refer to S.L. 1961, ch. 262 compiled as §§ 19-4301 — 19-4303, 19-4305.

Due Process.

In prosecution for murder where the autopsy was complete and adequate, defendant

was not prejudiced by the cremation of the body where there was no support for any allegation that state officials allowed the body to be cremated to destroy any evidence and the body was released to the next of kin, as

provided in this section, in good faith. *Paradis v. Arave*, 667 F. Supp. 1361 (D. Idaho 1987), rev'd on other grounds, 954 F.2d 1483 (9th Cir. 1992).

19-4301D. Coroner to make reports. — When the cause and manner of death is established under the provisions of this chapter the coroner shall make and file a written report of the material facts concerning the cause and manner of death in the office of the clerk of the district court. The coroner shall promptly deliver to the prosecuting attorney of each county having criminal jurisdiction over the case copies of all records relating to every death as to which further investigation may be advisable. Any prosecuting attorney or other law enforcement official may upon request secure copies of the original of such records or other documents or pertinent objects or information deemed necessary by him to the performance of his official duties. [I.C., § 19-4301D, as added by 1961, ch. 262, § 6, p. 459.]

19-4302. Jurors to be sworn. — When six (6) or more of the jurors attend, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death, and to render a true verdict thereon, according to the evidence offered them. [1864, p. 475, § 136; R.S., R.C., & C.L., § 8378; C.S., § 9310; I.C.A., § 19-4402; am. 1961, ch. 262, § 7, p. 459.]

Cited in: *Fairchild v. Ada County*, 6 Idaho 340, 55 P. 654 (1898); *In re Sly*, 9 Idaho 779, 76

P. 766 (1904); *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986).

19-4303. Examination of witnesses. — Coroners may issue subpoenas for witnesses, returnable forthwith, or at such time and place as they may appoint, which may be served by any competent person. They must summon and examine as witnesses every person who, in their opinion, or that of any of the jury, or the prosecuting attorney, has any knowledge of the facts. [1864, p. 475, § 137; R.S., R.C., & C.L., § 8379; C.S., § 9311; I.C.A., § 19-4403; am. 1961, ch. 262, § 8, p. 459.]

Compiler's notes. Section 9 of S.L. 1961, ch. 262 is compiled as § 19-4305.

Cited in: *In re Sly*, 9 Idaho 779, 76 P. 766 (1904); *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986).

quest and is ordered by coroner to inspect the body of deceased person and to give a professional opinion as to the cause of death, the reasonable value of his services in making the inspection is a charge against the county. *Fairchild v. Ada County*, 6 Idaho 340, 55 P. 654 (1898).

Compensation of Physician.

Where physician is subpoenaed at an in-

19-4304. Compelling attendance of witnesses. — A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace. [1864, p. 475, § 138; R.S., R.C., & C.L., § 8380; C.S., § 9312; I.C.A., § 19-4404.]

Cited in: *Fairchild v. Ada County*, 6 Idaho 340, 55 P. 654 (1898).

19-4305. Verdict of jury. — After hearing the testimony, the jury must render their verdict and certify the same by an inquisition in writing, signed by them, and setting forth who the person killed is, and when, where, and by what means he came to his death; and if he was killed, or his death occasioned by the act of another, by criminal means, who is guilty thereof. [1864, p. 475, § 139; R.S., R.C., & C.L., § 8381; C.S., § 9313; I.C.A., § 19-4405; am. 1961, ch. 262, § 9, p. 459.]

Compiler's notes. Section 8 of S.L. 1961, ch. 262 is compiled as § 19-4303. (1904); *In re Carpenter*, 88 Idaho 567, 401 P.2d 800 (1965).

Cited in: *In re Sly*, 9 Idaho 779, 76 P. 766

19-4306. Reduction of testimony to writing. — The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him with the inquisition, in the office of the clerk of the district court of the county. [1864, p. 475, § 140; R.S., R.C., & C.L., § 8382; C.S., § 9314; I.C.A., § 19-4406.]

Cited in: *State v. McClurg*, 50 Idaho 762, 300 P. 908 (1931); *Stattner v. City of Caldwell*, 111 Idaho 714, 727 P.2d 1142 (1986).

Depositions Not Admissible at Trial.

The coroner is not a judicial officer and proceedings are not regarded as being in court of record. *In re Sly*, 9 Idaho 779, 76 P. 766 (1904).

As a general rule, depositions taken at coroner's inquest are not admissible upon the trial of a person accused of having caused the death of person over whose body inquest was held. *State v. Squires*, 15 Idaho 545, 98 P. 413 (1908).

19-4307. Transmission of testimony to magistrate. — If, however, the person charged with the commission of the offense is arrested before the inquisition can be filed, the coroner must deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who must return the same, with the depositions and statement taken before him, to the office of the clerk of the district court of the county. [1864, p. 475, § 141; R.S., R.C., & C.L., § 8383; C.S., § 9315; I.C.A., § 19-4407.]

Cited in: *In re Sly*, 9 Idaho 779, 76 P. 766 (1904); *State v. Squires*, 15 Idaho 545, 98 P. 413 (1908).

19-4308. Warrant for arrest of accused. — If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act is ascertained by the inquisition, and is not in custody, the coroner must issue a warrant, signed by him, with his name of office, into one (1) or more counties, as may be necessary, for the arrest of the person charged. [1864, p. 475, § 142; R.S., R.C., & C.L., § 8384; C.S., § 9316; I.C.A., § 19-4408.]

Cited in: In re Sly, 9 Idaho 779, 76 P. 766 (1904); In re Carpenter, 88 Idaho 567, 401 P.2d 800 (1965).

19-4309. Form of warrant. — The coroner's warrant must be in substantially the following form:

County of

The state of Idaho, to any sheriff, constable, marshal, or policeman in this state:

An inquisition having been this day found by a coroner's jury before me, stating that A.B. has come to his death by the act of C.D., by criminal means (or as the case may be, as found by the inquisition), you are therefore commanded forthwith to arrest the above named C.D., and take him before the nearest or most accessible magistrate in this county.

Given under my hand this day of,

E.F.,

Coroner of the County of

[1864, p. 475, § 143; R.S., R.C., & C.L., § 8385; C.S., § 9317; I.C.A., § 19-4409; am. 2002, ch. 32, § 9, p. 46.]

Compiler's notes. Sections 8 and 10 of S.L. 2002, ch. 32 are compiled as §§ 19-3903 and 19-4407, respectively.

Cited in: In re Sly, 9 Idaho 779, 76 P. 766 (1904); In re Carpenter, 88 Idaho 567, 401 P.2d 800 (1967).

19-4310. Service of warrant. — The coroner's warrant may be served in any county, and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information before a magistrate; when served in another county it need not be indorsed by a magistrate of that county. [1864, p. 475, § 144; R.S., R.C., & C.L., § 8386; C.S., § 9318; I.C.A., § 19-4410.]

Cited in: In re Sly, 9 Idaho 779, 76 P. 766 (1904).

CHAPTER 44

SEARCH WARRANTS

SECTION.

- 19-4401. Search warrant defined.
- 19-4402. Use of search warrant.
- 19-4403. Affidavit of probable cause.
- 19-4404. Oral affidavit — Telephonic affidavit — Procedures.
- 19-4405. [Repealed.]
- 19-4406. Issuance of warrant.
- 19-4407. Form of warrant.
- 19-4408. Service of warrant.
- 19-4409. Service of warrant — Breaking open doors.
- 19-4410. Breaking doors to liberate officer or assistant.

SECTION.

- 19-4411. Service of warrant at night.
- 19-4412. Time for executing warrant.
- 19-4413. Receipt for property taken.
- 19-4414. Disposition of property.
- 19-4415. Return of warrant.
- 19-4416. Copy of inventory.
- 19-4417. Contest of warrant.
- 19-4418. Restoration of property.
- 19-4419. Return of papers to court.
- 19-4420. Search of accused person.

19-4401. Search warrant defined. — A search warrant is an order in writing, in the name of the state of Idaho, signed by a magistrate, judge or justice directed to an officer or officers named therein, or other officer authorized by law to execute search warrants directing the officer to search for and seize property or intangibles. [Cr. Prac. 1864, § 629; R.S., R.C., & C.L., § 8390; C.S., § 9319; I.C.A., § 19-4501; am. 1987, ch. 321, § 1, p. 676.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 4 of S.L. 1987, ch. 321 provided that "An emergency existing therefor, which emergency is hereby declared." Such emergency is probably ineffective since the clause does not contain language necessary to declare an emergency. Therefore although this legislation (S.L. 1987, ch. 321) was approved April 6, 1987 it probably will not become effective until July 1, 1987.

Cross ref. Illegal arrest, search or seizure, penalties, § 18-703.

Search and seizure, I.C.R. 41.

Sec. to sec. ref. This chapter is referred to in § 62-1002.

ANALYSIS

Probable cause.

Unsigned warrant.

Probable Cause.

Since the statute making the unauthorized dispensing of prednisolone a criminal offense is not unconstitutional, there was probable cause to support the search warrant which resulted in the discovery of the capsules. *State v. Kellogg*, 100 Idaho 483, 600 P.2d 787 (1979).

Unsigned Warrant.

Constitution, Art. 1, § 17, I.C.R., Rule 41, and §§ 19-4406, 19-4407 and this section require a magistrate or district judge's signature in order for a search warrant to be validly issued. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Even though §§ 19-4406, 19-4407 and this section which create a substantive right in a citizen to refuse to permit a search pursuant to an unsigned warrant predate the Constitution of Idaho, such right was affirmed by Const., Art. 21, § 2. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Since Const., Art. 1, § 17, I.C.R., Rule 41 and §§ 19-4406, 19-4407 and this section require a search warrant to be signed by a magistrate or district judge in order to be valid, search warrant that was not signed even though judge testified that he intended

to sign it but forgot to do so was not a valid search warrant and where officers conducted a search under such warrant by showing the owner of the premises the affidavit of officer that was signed by judge as a witness to the officer's signature when the unsigned warrant was questioned admittance was gained through deception and evidence obtained in such search was not admissible. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Collateral References. 68 Am. Jur. 2d, Searches and Seizures, § 1 et seq.

79 C.J.S., Searches and Seizures, § 1 et seq.

Propriety in legality of issuing only one search warrant to search more than one place or premises occupied by same person. 31 A.L.R.2d 864.

Authority to consent for another to search or seizure. 31 A.L.R.2d 1078.

Premises temporarily unoccupied as dwelling within provision forbidding unreasonable search of dwelling. 33 A.L.R.2d 1430.

Sufficiency of description of automobile or other conveyance to be searched. 47 A.L.R.2d 1444.

Sufficiency of description in warrant of person to be searched. 43 A.L.R.5th 1.

Mail, opening, search, and seizure of. 61 A.L.R.2d 1282.

Interest in, or connection with, premises searched as affecting standing to attack legality of search. 78 A.L.R.2d 246.

Federal Constitution as affecting admissibility of evidence obtained by illegal search and seizure. 84 A.L.R.2d 959.

Transiently occupied room in hotel, motel, or rooming-house as within provision forbidding unreasonable searches and seizures. 86 A.L.R.2d 984.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 A.L.R.2d 715.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure. 5 A.L.R.3d 670.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding. 8 A.L.R.3d 473.

Validity of consent to search given by one in custody of officers. 9 A.L.R.3d 858.

Lawfulness of search of motor vehicle following arrest for traffic violation. 10 A.L.R.3d 314.

Propriety of considering hearsay or other

incompetent evidence in establishing probable cause for issuance of search warrant. 10 A.L.R.3d 359.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple height occupancy structure. 11 A.L.R.3d 1330.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, arrest and search. 19 A.L.R.3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure. 20 A.L.R.3d 724.

Propriety of execution of search warrant at night time. 41 A.L.R.5th 171.

Violation of federal constitutional rule (*Matt v. Ohio*) excluding evidence obtained through unreasonable search and seizure, as constituting reversible or harmless error. 30 A.L.R.3d 128.

Admissibility, in criminal case, of evidence obtained by search of private individual. 36 A.L.R.3d 553.

Comment note on "Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in a legal search. 43 A.L.R.3d 385.

"Furtive" movement or gesture as justifying police search. 45 A.L.R.3d 581.

Lawfulness of "inventory search" of motor vehicle impounded by police. 48 A.L.R.3d 537.

Observation through binoculars as constituting unreasonable search. 48 A.L.R.3d 1178.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 A.L.R.3d 172.

Disputation of truth of matters stated in affidavit in support of search warrant — Modern cases. 24 A.L.R.4th 1266.

Propriety of state or local government health officer's warrantless search — post-*Camara* case. 53 A.L.R.4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items. 54 A.L.R.4th 391.

19-4402. Use of search warrant. — (1) A search warrant may be issued to search for and seize:

1. Any property or intangible that constitutes evidence of a criminal offense.

2. Contraband, the fruits of crime, or things otherwise criminally possessed.

3. Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

4. A person named in an arrest warrant. [Cr. Prac. 1864, § 630; R.S., R.C., & C.L., § 8391; C.S., § 9320; I.C.A., § 19-4502; am. 1987, ch. 321, § 2, p. 676.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 3 of S.L. 1987, ch. 321 contains a repeal.

Section 4 of S.L. 1987, ch. 321 provided that "An emergency existing therefor, which emergency is hereby declared." Such emergency is probably ineffective since the clause does not contain the language necessary to declare an emergency. Therefore although this legislation (S.L. 1987, ch. 321) was approved April 6, 1987 it probably will not become effective until July 1, 1987.

Cross ref. Fish and game laws, right of search under, § 36-1303; seizures, § 36-1304.

Sec. to sec. ref. This section is referred to in § 19-4414.

Exceptions to When Search Warrant Required.

Where officer had right to enter defendant's house in responding to a 911 call and had obtained consent to enter back bedroom where incriminating evidence was discovered, two-part test for plain view was satisfied and rendered a search warrant unnecessary to justify seizure of the items; order denying suppression of items upheld. *State v. Hagedorn*, 129 Idaho 155, 922 P.2d 1081 (Ct. App. 1996).

Collateral References. Carriers, power to issue warrant for search of train. 7 A.L.R. 121.

Federal Constitution as a limitation upon the powers of the states in respect to search and seizure. 19 A.L.R. 644.

Bond of peace officer, liability on, for unlawful search. 62 A.L.R. 855.

Distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime and the

actual instrumentalities of crime. 129 A.L.R. 1296.

Previous illegal search for or seizure of property as affecting validity of subsequent seizure under search warrant. 143 A.L.R. 135.

Seizure of instruments of or articles connected with one offense on search incident to another offense. 169 A.L.R. 1419.

Authority to consent to search and seizure. 31 A.L.R.2d 1078.

Illegal search and seizure, admissibility of evidence obtained by. 50 A.L.R.2d 531; 43 A.L.R.3d 385.

Requisites and sufficiency of affidavit upon which search warrant is issued as regards the time when information as to offense was received by officer or his informant. 100 A.L.R.2d 525.

19-4403. Affidavit of probable cause. — A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched. [Cr. Prac. 1864, § 631; R.S., R.C., & C.L., § 8392; C.S., § 9321; I.C.A., § 19-4503.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Procurement of search warrant without probable cause a misdemeanor, § 18-709.

Search without warrant under fish and game laws, § 36-1303.

Similar constitutional provision, Const., Art. 1, § 17.

Cited in: *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978).

ANALYSIS

Description in affidavit.

In general.

Search warrants.

Description in Affidavit.

The affidavit as the sole basis and justification for the issuance of the search warrant controls and circumscribes the description in the warrant. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

The affidavit in support of the search warrant was valid where the stipulated facts established that the officer was sworn in before the magistrate, he stated that all the facts in his affidavit were true and correct and that the signature on the first page was his own, and the affidavit was signed in three places by the officer and acknowledged by the magistrate. *State v. Slater*, 133 Idaho 882, 994 P.2d 625 (Ct. App. 1999).

In General.

A search warrant issued on information and belief, unsupported by facts submitted to magistrate, and based on conclusions, is illegal and a search thereunder is an unlawful violation of constitutional rights; a charge in

an affidavit for search warrant is not supported by the affidavit unless it is supported by evidence. *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927).

Facts to support a search warrant need not be sufficient upon which to base a jury's verdict, but they must be sufficient upon which to find probable cause, and conclusions of law or fact are insufficient. *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927).

The validity of a warrant and search thereunder may be tested by a motion to suppress the evidence and no independent action could be maintained to secure the fruits of the illegal search and seizure. *State v. Arregui*, 44 Idaho 43, 254 P. 788, 52 A.L.R. 463 (1927).

An affidavit or recorded testimony which uses hearsay upon hearsay to establish probable cause is not acceptable for use by a magistrate in determining whether or not to issue a search warrant unless the facts indicate the reliability of both the initial source and the affiant's source. *State v. Oropeza*, 97 Idaho 387, 545 P.2d 475 (1976).

Search Warrants.

The description in a search warrant of the premises to be searched should conform to the description in the affidavit for such warrant. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

If the description of the premises to be searched contained in a search warrant be restricted, but is included in the description of the premises to be searched in the affidavit for such warrant, the warrant is less subject to being considered invalid than if the description in the warrant comprehends more than the affidavit. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

Where search warrant described premises to be searched as "the _____ Club" and did not exclude any part thereof, trial court was justified in considering the warrant good as to "a place under the _____ Club," where the

search was made only in the basement of such club. *State v. Constanzo*, 76 Idaho 19, 276 P.2d 959 (1954).

Court did not err in denying suppression of evidence obtained by search conducted under warrant issued on the basis of informant's electronically recorded testimony as the term "affidavit" is broad enough to include electronic recording. *State v. Badger*, 96 Idaho 168, 525 P.2d 363 (1974).

Magistrate judge properly dismissed a complaint charging possession of cocaine where the evidence was seized pursuant to a war-

rant based on oral testimony, but the tape recording of the oral testimony failed, leaving no record of that testimony. *State v. Zielinski*, 119 Idaho 316, 805 P.2d 1240 (1991).

Court, in defendant's drug case, erred by suppressing evidence where the judge, the witness and the prosecutor all treated a second warrant hearing as a continuance of the initial proceeding, the previously issued warrant was not executed, and therefore, it was unnecessary for the affiant to have an oath administered again. *State v. Nunez*, 138 Idaho 636, 67 P.3d 831 (2003).

19-4404. Oral affidavit — Telephonic affidavit — Procedures. — In lieu of a written affidavit, the magistrate may take an oral statement under oath which shall be recorded and transcribed. The judge is authorized to administer an oath or affirmation by telephone, and to take testimony by telephone. All testimony given over the telephone that is intended to support an application for a search warrant must be given on oath or affirmation and must identify the person testifying. The affidavit or oral testimony as recorded must be filed with the clerk of the court. [I.C., § 19-4404, as added by 1994, ch. 415, § 1, p. 1304.]

Compiler's notes. Former §§ 19-4404 and 19-4405, which comprised Cr. Prac. 1864, §§ 632, 633; R.S., R.C., & C.L., §§ 8393, 8394; C.S., §§ 9322, 9323; I.C.A., §§ 19-4504, 19-4505, were repealed by S.L. 1987, ch. 321, § 3.

Section 2 of S.L. 1994, ch. 415 is compiled as § 19-4406.

Cited in: *State v. Nunez*, 138 Idaho 636, 67 P.3d 831 (2003).

19-4405. Deposition to state facts. [Repealed].

Compiler's notes. For former § 19-4405, see Compiler's notes, § 19-4404.

19-4406. Issuance of warrant. — If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

If the affidavit for the warrant is related to the court telephonically, the magistrate may verbally authorize a peace officer to sign the magistrate's name on a duplicate original warrant, which verbal authorization shall be recorded and transcribed. After service of the warrant, this duplicate original warrant must be returned to the magistrate who authorized the signing of his name on it. The magistrate shall then endorse his name and enter the date on the warrant when it is returned to him. Any failure of the magistrate to make such an endorsement does not in itself invalidate the warrant. [Cr. Prac. 1864, § 634; R.S., R.C., & C.L., § 8395; C.S., § 9324; I.C.A., § 19-4506; am. 1994, ch. 415, § 2, p. 1304.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Section 1 of S.L. 1994, ch. 415 is compiled as § 19-4404.

Cross ref. Liquor law enforcement officers, power to serve and execute warrants of search and seizure, § 23-807.

Cited in: Struve v. Wilcox, 99 Idaho 205, 579 P.2d 1188 (1978).

ANALYSIS

Signature.

Unsigned warrant.

When properly issued.

Signature.

Constitution, Art. 1, § 17, I.C.R., Rule 41, and §§ 19-4401, 19-4407 and this section require a magistrate or district judge's signature in order for a search warrant to be validly issued. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Unsigned Warrant.

Since Const., Art. 1, § 17, I.C.R., Rule 41 and §§ 19-4401, 19-4407 and this section require a search warrant to be signed by a magistrate or district judge in order to be

valid, search warrant that was not signed even though judge testified that he intended to sign it but forgot to do so was not a valid search warrant and where officers conducted a search under such warrant by showing the owner of the premises the affidavit of officer that was signed by judge as a witness to the officer's signature when the unsigned warrant was questioned admittance was gained through deception and evidence obtained in such search was not admissible. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Even though §§ 19-4401, 19-4407 and this section which create a substantive right in a citizen to refuse to permit a search pursuant to an unsigned warrant predate the Constitution of Idaho, such right was affirmed by Const., Art. 21, § 2. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

When Properly Issued.

Where it was determined officer had not illegally entered defendant's house in responding to a 911 call and had obtained consent to enter other areas of the house, the facts contained in the affidavit which were derived from his efforts were properly considered by the magistrate in issuing the search warrant and the evidence obtained pursuant to the search warrant was properly admissible. *State v. Hagedorn*, 129 Idaho 155, 922 P.2d 1081 (Ct. App. 1996).

19-4407. Form of warrant. — The warrant must be in substantially the following form:

County of

The state of Idaho to any sheriff, constable, marshal, or policeman in the county of: Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application, or, if the affidavit be not positive, that there is probable cause for believing that — stating the ground of the application in the same manner), you are therefore commanded, in the daytime (or at any time of the day or night, as the case may be) to make immediate search of the person of C.D. (or in the house situated, describing it or any other place to be searched, with reasonable particularity, as the case may be) for the following property: (describing it with reasonable particularity); and if you find the same or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand, and dated this day of

E.T., Justice of the Peace.

(Or as the case may be.)

[Cr. Prac. 1864, § 635; R.S., R.C., & C.L., § 8396; C.S., § 9325; I.C.A., § 19-4507; am. 2002, ch. 32, § 10, p. 46.]

Compiler's notes. This section was made a rule of procedure and practice for the courts

of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Sections 9 and 11 of S.L. 2002, ch. 32, §§ 9 and 11 are compiled as §§ 19-4309 and 32-401.

Signature.

Even though §§ 19-4401, 19-4406 and this section which create a substantive right in a citizen to refuse to permit a search pursuant to an unsigned warrant predate the Constitution of Idaho, such right was affirmed by Const., Art. 21, § 2. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Constitution, Art. 1, § 17, I.C.R., Rule 41, and §§ 19-4401, 19-4406 and this section require a magistrate or district judge's signature in order for a search warrant to be

validly issued. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

Since Const., Art. 1, § 17, I.C.R., Rule 41 and §§ 19-4401, 19-4406 and this section require a search warrant to be signed by a magistrate or district judge in order to be valid, search warrant that was not signed even though judge testified that he intended to sign it but forgot to do so was not a valid search warrant and where officers conducted a search under such warrant by showing the owner of the premises the affidavit of officer that was signed by judge as a witness to the officer's signature when the unsigned warrant was questioned admittance was gained through deception and evidence obtained in such search was not admissible. *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997).

19-4408. Service of warrant. — A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. [Cr. Prac. 1864, § 636; R.S., R.C., & C.L., § 8397; C.S., § 9326; I.C.A., § 19-4508.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

ANALYSIS

Entry prior to delivery of warrant.

Execution of warrant.

Search of person.

Securing the premises.

Entry Prior to Delivery of Warrant.

Where two police officers and narcotics agent entered defendant's residence without warrant, which had been issued but not yet delivered, found defendant's wife and child and looked through house for other people, then waited ten to fifteen minutes until the officer who had arrested defendant three or four blocks away arrived with the search warrant, after which police searched the house and discovered heroin and marijuana, the initial act of "securing the premises" prior to the arrival of the search warrant did not violate this section or I.C.R. 41. *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980),

cert. denied, 454 U.S. 963, 102 S. Ct. 503, 70 L. Ed. 2d 378 (1981).

Execution of Warrant.

Court properly suppressed evidence seized at defendant's business in a tax evasion case where a tax commission employee directed the execution of the search warrant, and police were present but played a very minimal role. *State v. Card*, 137 Idaho 182, 45 P.3d 838 (2002).

Search of Person.

Where officers have a warrant to search a public place, such as a pool hall, shop or store, they have no right to search customers or visitors found therein who have no connection therewith, and a search of a person grounded on nothing more than suspicion, without a warrant, is illegal. *Purkey v. Maby*, 33 Idaho 281, 193 P. 79 (1920).

Securing the Premises.

An entry intended to secure the premises is not improper when undertaken after the issuance of a search warrant and with knowledge of its existence, but prior to its arrival at the premises to be searched. *State v. Gomez*, 101 Idaho 802, 623 P.2d 110 (1980), cert. denied, 454 U.S. 963, 102 S. Ct. 503, 70 L. Ed. 2d 378 (1981).

19-4409. Service of warrant — Breaking open doors. — The officer may break open any outer or inner door or window of a house, or any part of a house, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. [Cr. Prac. 1864, § 637; R.S., R.C., & C.L., § 8398; C.S., § 9327; I.C.A., § 19-4509.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Johnson*, 110 Idaho 516, 716 P.2d 1288 (1986).

ANALYSIS

Exigent circumstances.

Failure to announce purpose.

Forfeiture actions.

Illegally seized evidence.

Purpose.

Substantial compliance.

Exigent Circumstances.

The term "exigent circumstances" in the "knock and announce" context does not necessarily, although it may, carry the same meaning as it does in the warrantless entry and warrantless arrest context. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

In the context of "knock and announce" statutes, "exigent circumstances" may refer to those immediate circumstances where a defendant may be armed, where evidence may be easily and immediately destroyed, where a defendant may escape or where a defendant has engaged in furtive conduct. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

No inconsistency would exist between a finding of the existence of probable cause to enter and secure a house until a search warrant could be obtained and the finding that no exigent circumstances existed which would allow the officers to ignore the knock and announce statute, because of the entirely different time frames involved. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

To create exigent circumstances which would justify a belief that evidence would be lost requires evidence such as furtive or rapid movements in the house or warning calls within the house; and independent grounds could exist where there is evidence of weapons in the house which would endanger the lives of the officers if they announced their presence. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

Failure to Announce Purpose.

There was substantial evidence to justify the trial judge's finding that exigent circumstances did not exist to excuse noncompliance with the "knock and announce" statutes, where there was no evidence presented which indicated that there were weapons in the house or that there was furtive conduct in the house which would justify the belief that evidence would be lost in the time it would have taken to comply with the "knock and

announce" statute. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

Forfeiture Actions.

Given the important policies served by this section and the quasi-penal nature of forfeiture proceedings, the exclusionary rule for violations of this section, first adopted in *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978), extends to forfeiture actions brought under the authority of § 37-2744. *Richardson v. Four Thousand Five Hundred Forty-Three Dollars, United States Currency*, 120 Idaho 220, 814 P.2d 952 (Ct. App. 1991).

Illegally Seized Evidence.

The very sanctity of the home that underlies the passage of "knock and announce" statutes requires that evidence seized as a result of the violation of those statutes be excluded. *State v. Rauch*, 99 Idaho 586, 586 P.2d 671 (1978).

The mere fact that property is seized illegally does not immunize it from forfeiture. Although evidence which is the product of the seizure must be excluded at trial, the state may pursue a forfeiture claim if it can show that the property is subject to forfeiture with evidence which is not tainted by the illegal seizure. *Richardson v. Four Thousand Five Hundred Forty-Three Dollars, United States Currency*, 120 Idaho 220, 814 P.2d 952 (Ct. App. 1991).

Purpose.

The primary purposes of knock-and-announce statutes are to protect the privacy of the occupant and to prevent situations which are conducive to violent confrontations between the occupant and individuals who enter without proper notice. *State v. Walker*, 107 Idaho 308, 688 P.2d 1213 (Ct. App. 1984).

Substantial Compliance.

Where officers otherwise complied with knock-and-announce statutes by knocking, announcing their presence and disclosing their identity or authority, but stated their purpose for entering only after they had gained entrance to the premises, substantial compliance with the statutes occurred and the entry was legal. *State v. Walker*, 107 Idaho 308, 688 P.2d 1213 (Ct. App. 1984).

An officer who entered a house while announcing his purpose rather than making the announcement prior to entry, substantially complied with this section in light of the suspect's flight from the front room of the house upon officer's approach. *State v. Ruess*, 118 Idaho 707, 800 P.2d 103 (Ct. App. 1990).

Where officers who arrived at the front door of defendant's apartment to serve a search warrant knocked loudly on the front door several times, pausing in between, where ten to fifteen seconds after the second knock, an

officer announced that they were the police and that they had a search warrant for the premises, where approximately six seconds later, the officers knocked again, where at the same time, one of the officers, following instruction from his supervisor, kicked the door open, and where approximately one minute had elapsed between the first knock and the time the officer kicked open the door, the letter and the purpose of the knock-and-an-

nounce statute were complied with; therefore, the district court's refusal to suppress the evidence seized in the ensuing search was not in error. *State v. Sorbel*, 124 Idaho 275, 858 P.2d 814 (Ct. App. 1993).

Collateral References. Search for purpose of making an arrest. 5 A.L.R. 263.

What constitutes compliance with knock-and-announce rule in search of private premises — state cases. 85 A.L.R.5th 1.

19-4410. Breaking doors to liberate officer or assistant. — He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. [Cr. Prac. 1864, § 638; R.S., R.C., & C.L., § 8399; C.S., § 9328; I.C.A., § 19-4510.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-4411. Service of warrant at night. — The magistrate must insert a direction in the warrant that it be served in the day time unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night. [Cr. Prac. 1864, § 639; R.S., R.C., & C.L., § 8400; C.S., § 9329; I.C.A., § 19-4511.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985); *State v. Cada*, 129 Idaho 224, 923 P.2d 469 (Ct. App. 1996).

ANALYSIS

Certainty of affidavit.
Construction with I.C.R. 41.
Discretion of court.
Failure to raise issue.
Probable cause.
Quantum of showing.
Sufficiency of affidavit.

Certainty of Affidavit.

This section does not require that the affiant be positive that the property is in the place to be searched before a magistrate can authorize nighttime execution of a search warrant. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

Where the facts contained in the affidavit

for search warrant, which were supplied to the affiant by a credible and reliable informant and law enforcement officers with personal observations, was of such a definite, explicit and positive nature as to satisfy any requirement of this section that the affiant is "positive" that the contraband was located on the premises to be searched, those requirements were met. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

To justify nighttime execution of a warrant, the affidavit must both show reasonable cause for conducting the search at night, and must be positive that controlled substances were in the place to be searched. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985); *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App.), cert. denied, 469 U.S. 918, 105 S. Ct. 296, 83 L. Ed. 2d 231 (1984).

While this section requires "positive" facts showing that the property is in the place to be searched before a warrant for a night search may issue, I.C.R. 41(c) provides that the authority issuing the warrant may, by appropriate provision in the warrant, and for reasonable cause shown, authorize its execution at

times other than daytime. To the extent that these requirements for a night search conflict, the standard of reasonable cause in I.C.R. 41 controls over the provisions of this section; thus, where the magistrate's issuance of a warrant for a nighttime search was based upon reasonable cause to believe that contraband was in fact upon the premises to be searched and that a nighttime search was reasonable, "reasonable cause," within the meaning of I.C.R. 41, existed for the issuance of a nighttime search warrant. *State v. Lewis*, 107 Idaho 616, 691 P.2d 1231 (1984).

Construction with I.C.R. 41.

I.C.R. 41 would control to the exclusion of this section. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

The Supreme Court has chosen to give subsection (c) of I.C.R. 41 dominant effect over this section; accordingly, when a magistrate reasonably feels a nighttime search would serve the ends of justice, his discretionary decision will not be disturbed on appeal. *State v. Burke*, 110 Idaho 621, 717 P.2d 1039 (Ct. App. 1986).

Discretion of Court.

A magistrate's finding of reasonable cause for a nighttime search will not be disturbed on appeal, absent an abuse of discretion. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App.), cert. denied, 469 U.S. 918, 105 S. Ct. 296, 83 L. Ed. 2d 231 (1984).

Failure to Raise Issue.

Where no assertion was made in the district court that search pursuant to the warrant was invalid because it was conducted at nighttime and the nighttime search issue was raised for the first time on appeal, the appellate court would not consider the alleged error

on appeal. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (Ct. App.), cert. denied, 469 U.S. 918, 105 S. Ct. 296, 83 L. Ed. 2d 231 (1984).

Probable Cause.

The reasonableness of a police search will not be judged in retrospect according to what evidence it turned up; rather, the court must determine whether probable cause existed from that which the officer was aware of at the time he made the decision to search. *State v. Lewis*, 107 Idaho 616, 691 P.2d 1231 (1984).

Quantum of Showing.

The Supreme Court and the legislature intended that while a daytime warrant could be issued on the basis of probable cause, a greater showing was necessary before a warrant may be executed at night. *State v. Lindner*, 100 Idaho 37, 592 P.2d 852 (1979).

Sufficiency of Affidavit.

Where the affidavit for the search warrant stated that time was of the essence and requested that nighttime search be authorized "to prevent the controlled substances from being consumed, destroyed or sold, or otherwise disposed of," and the affidavit made explicit statements indicating that controlled substances were in the place to be searched, it was reasonable to believe that a nighttime search was necessary because the controlled substances might not be present on the premises at daybreak; therefore the affidavit met the requirement of both this section and I.C.R. 41(c), justifying the authorization of nighttime execution of the warrant. *State v. Fowler*, 106 Idaho 3, 674 P.2d 432 (Ct. App. 1983), overruled on other grounds, *State v. Holman*, 109 Idaho 382, 707 P.2d 493 (Ct. App. 1985).

19-4412. Time for executing warrant. — A search warrant must be executed and returned to the magistrate who issued it, within fourteen (14) days after its date; after the expiration of this time the warrant, unless executed, is void. [Cr. Prac. 1864, § 640; R.S., R.C., & C.L., § 8401; C.S., § 9330; I.C.A., § 19-4512; am. 2001, ch. 201, § 1, p. 681.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Wright*, 115 Idaho 1043, 772 P.2d 250 (Ct. App. 1989).

Reissued Warrant.

Court, in defendant's drug case, erred by

suppressing evidence where a search warrant that had been reissued was valid because the magistrate was clearly issuing a new warrant based upon new evidence presented at the hearing, the warrant was signed again and dated by the magistrate, and therefore, it did not matter that the magistrate used the same warrant signed previously. *State v. Nunez*, 138 Idaho 636, 67 P.3d 831 (2003).

19-4413. Receipt for property taken. — When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property. [Cr. Prac. 1864, § 641; R.S., R.C., & C.L., § 8402; C.S., § 9331; I.C.A., § 19-4513.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: State v. Gumm, 99 Idaho 549, 585 P.2d 959 (1978); State v. Card, 137 Idaho 182, 45 P.3d 838 (2002).

ANALYSIS

Inventory.

Proof of seizure.

Inventory.

In considering a motion for return of property, the court will be assisted in its determination of what was actually seized by the

state by a proper inventory of the seized items created at the time of the seizure. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

Proof of Seizure.

Where an inventory was clearly deficient, but the claimant failed to introduce testimony or evidence which sufficiently rebutted the state's initial assertion that all of the seized items had been returned, and where the claimant's own testimony and pleadings supported the state's claim that allegedly missing items were not seized, the district court's determination that the missing items had not been seized by the state was supported by competent and substantial evidence. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

19-4414. Disposition of property. — When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections 19-3801 — 19-3806 inclusive. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section 19-4402, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property taken is triable. [Cr. Prac. 1864, § 642; R.S., R.C., & C.L., § 8403; C.S., § 9332; I.C.A., § 19-4514.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cross ref. Disposition of stolen or confiscated property, §§ 19-3801 — 19-3807.

19-4415. Return of warrant. — The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory, and taken before the magistrate at the time, to the following effect: "I, R.S., the officer by whom this warrant was executed do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant." [Cr. Prac. 1864, § 643; R.S., R.C., & C.L., § 8404; C.S., § 9333; I.C.A., § 19-4515.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Hagedorn*, 129 Idaho 155, 922 P.2d 1081 (Ct. App. 1996); *State v. Card*, 137 Idaho 182, 45 P.3d 838 (2002).

ANALYSIS

Defects.
Failure to return.
Failure to verify.
Inventory.
Proof of seizure.

Defects.

Defects in the return of a search warrant are not of a constitutional dimension. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Failure to Return.

Where the warrant and inventory were not returned promptly to a district judge or to a magistrate in the county of the warrant's origin as required by I.C.R. 41(d) and this section, but a copy of the inventory was made available to the defendants at their preliminary hearing, which was held shortly after the search and several months prior to trial, the defendants made no showing that failure to return the original warrant and inventory

materially infringed upon any constitutionally protected interest, and there was no need to activate the exclusionary rule. *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988).

Failure to Verify.

The police officer's failure to promptly verify the return of the search warrant did not require suppression of the evidence seized pursuant to the warrant. *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986).

Inventory.

In considering a motion for return of property, the court will be assisted in its determination of what was actually seized by the state by a proper inventory of the seized items created at the time of the seizure. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

Proof of Seizure.

Where an inventory was clearly deficient, but the claimant failed to introduce testimony or evidence which sufficiently rebutted the state's initial assertion that all of the seized items had been returned, and where the claimant's own testimony and pleadings supported the state's claim that allegedly missing items were not seized, the district court's determination that the missing items had not been seized by the state was supported by competent and substantial evidence. *Butler Trailer Mfg. v. State*, 132 Idaho 687, 978 P.2d 247 (Ct. App. 1999).

19-4416. Copy of inventory. — The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken, and to the applicant for the warrant. [Cr. Prac. 1864, § 644; R.S., R.C., & C.L., § 8405; C.S., § 9334; I.C.A., § 19-4516.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court

promulgated October 24, 1974, effective January 1, 1975.

Cited in: *State v. Gumm*, 99 Idaho 549, 585 P.2d 959 (1978).

19-4417. Contest of warrant. — If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by the magistrate. [Cr. Prac. 1864, §§ 645, 646; R.S., R.C., & C.L., § 8406; C.S., § 9335; I.C.A., § 19-4517.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-4418. Restoration of property. — If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken. [Cr. Prac. 1864, § 647; R.S., R.C., & C.L., § 8407; C.S., § 9336; I.C.A., § 19-4518.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

19-4419. Return of papers to court. — The magistrate must annex together the depositions, the search warrant and return, and the inventory, and return them to the next term of the court having power to inquire into the offenses in respect to which the search warrant was issued, at or before its opening on the first day. [Cr. Prac. 1864, § 648; R.S., R.C., & C.L., § 8408; C.S., § 9337; I.C.A., § 19-4519.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

mal and untimely manner, an inquiry into the facts as to a federal search warrant, offering as an excuse for not objecting earlier that the warrant should have been returned under this section, it was not improper to permit filing of such warrant. *State v. Severns*, 47 Idaho 246, 273 P. 940 (1929).

Waiver.

Where defendant precipitated, in an infor-

19-4420. Search of accused person. — When a person charged with a felony is supposed by the magistrate before whom he is brought to have on his person a dangerous weapon, or any thing which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or to the order of the court in which the defendant may be tried. [Cr. Prac. 1864, § 651; R.S., R.C., & C.L., § 8409; C.S., § 9338; I.C.A., § 19-4520.]

Compiler's notes. This section was made a rule of procedure and practice for the courts of Idaho by order of the Supreme Court promulgated March 19, 1951 which order was

rescinded by order of the Supreme Court promulgated October 24, 1974, effective January 1, 1975.

CHAPTER 45

PROCEEDINGS AGAINST FUGITIVES FROM JUSTICE

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- 19-4532. Hearing — Order of court.
- 19-4533. Construction.
- 19-4534. Short title.

19-4501. Definitions. — Where appearing in this act, the term “governor” includes any person performing the functions of governor by authority of the law of this state. The term “executive authority” includes the governor, and any person performing the functions of governor in a state other than this state. And the term “state” referring to a state other than this state refers to any other state or territory organized or unorganized of the United States of America. [1927, ch. 29, § 1, p. 31; I.C.A., § 19-4601.]

Compiler’s notes. The words “this act” refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

Cross ref. Governor may offer rewards, § 67-802, subd. 8.

Record of rewards offered, § 67-804.

Comp. leg. Cal. Penal Code § 1547 et seq.
Mont. Rev. Codes Ann. §§ 46-30-101 to 46-30-413.

Nev. Rev. Stat. §§ 179.177 — 179.235.

Utah. Code Ann. 1953 §§ 77-30-1 to 77-30-28.

Wash. Rev. Code §§ 10.88.200 — 10.88.930.

Wyo. Stat. 1977 §§ 7-3-201 — 7-3-227.

Cited in: *Richardson v. State*, 90 Idaho 566, 414 P.2d 871 (1966); *Snyder v. State*, 95 Idaho 643, 516 P.2d 700 (1973); *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977).

Collateral References. 31A Am. Jur. 2d, Extradition, § 1 et seq.

35 C.J.S., Extradition and Detainers, § 1 et seq.

Immunity of extradited person from service of process. 20 A.L.R.2d 163, 172.

Determination, in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged. 40 A.L.R.2d 1151.

Necessity and sufficiency of identification of accused as the person charged, to warrant extradition. 93 A.L.R.2d 912.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings. 33 A.L.R.3d 1443.

Extradition of juveniles. 73 A.L.R.3d 700.

19-4502. Criminals to be delivered upon requisition. — Subject to the qualifications of this act, and the provisions of the Constitution of the United States controlling, and acts of congress in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state. [1927, ch. 29, § 2, p. 31; I.C.A., § 19-4602.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

must be charged with a crime within the jurisdiction of the demanding state. *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977).

Procedure.

Before a fugitive may be extradited, he

19-4503. Form of demand. — No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth. [1927, ch. 29, § 3, p. 31; I.C.A., § 19-4603.]

Compiler's notes. Under the decision in *Application of Williams*, 76 Idaho 173, 279 P.2d 882 it was held that since the Uniform Criminal Extradition Act adopted by Idaho should be interpreted and construed so as to make the law uniform (§ 19-4526) that part of this section requiring a copy of a warrant with extradition papers is void, it being contrary to the terms of the federal statute governing extradition.

ANALYSIS

Conflict with federal statute.

Extradition proper.

Indictment.

"Substantially charged."

Sufficiency of affidavit.

Conflict with Federal Statute.

This section allowing extradition where it is shown that the laws of the demanding state authorize a criminal charge to be made by an information and where a copy of the information supported by an affidavit accompanies the demand for extradition does not burden the scheme contemplated by the federal extradition statute, 18 U.S.C. § 3182, and therefore does not conflict with it. *Hanson v. Watson*, 103 Idaho 609, 651 P.2d 543 (Ct. App. 1982).

Extradition Proper.

Where the state of Oregon sought the return of the defendant parent on a felony charge of custodial interference in the first degree, and the allegations in the extradition documents showed that the defendant had removed his child from Oregon, that he avoided contact with the custodial parent (his former wife), that he quit his job in Oregon without notice the day he was to return the

child to his former wife and joined the child in another state, and that he was indicted in Oregon for such acts, the court properly determined that the defendant was a fugitive subject to extradition, despite the defendant's contention that he was not in the state of Oregon when the crime was alleged to have been committed. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Indictment.

The fifth amendment does not require an indictment of a fugitive by a grand jury in the demanding state before he can be extradited to that state. *Hanson v. Watson*, 103 Idaho 609, 651 P.2d 543 (Ct. App. 1982).

"Substantially Charged."

Where the record included an authenticated copy of an indictment from Oregon and an affidavit that the defendant had been charged in Oregon with the felony crime of custodial interference in the first degree, the record showed that the defendant had been "substantially charged" with a crime under the law of Oregon, as was required for extradition to be proper, notwithstanding the defendant's contention that since his name did not appear in the Oregon county clerk's register and no file concerning this criminal charge had been created, he had not been charged with a crime in Oregon. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

In proceeding challenging sufficiency of extradition documents submitted by state of Nevada, where record showed that a Nevada judge had issued an arrest warrant based upon a criminal complaint which, in turn, was supported by an affidavit and that, under Nevada law, such warrants must be issued upon determinations of probable cause, and

where defendant made no affirmative showing that the arrest warrant was issued in violation of procedural requirements imposed by Nevada law, the defendant was "substantially charged", in the sense that probable cause was established. *Proctor v. Skinner*, 104 Idaho 426, 659 P.2d 779 (Ct. App. 1982).

Sufficiency of Affidavit.

In extradition proceeding it is not necessary that the affidavit attached to the extradition documents of the demanding state charge the

accused with every element essential to the crime but only that the affidavit substantially charge him with the commission of a crime. *Jacobsen v. State*, 99 Idaho 45, 577 P.2d 24 (1978).

The affidavit supporting the information relied upon in an extradition proceeding need not be signed before a magistrate. *Hanson v. Watson*, 103 Idaho 609, 651 P.2d 543 (Ct. App. 1982).

19-4504. Governor may investigate case. — When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney-general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. [1927, ch. 29, § 4, p. 31; I.C.A., § 19-4604.]

19-4505. What papers must show. — A warrant of extradition must not be issued, except in cases arising under section 19-4506, Idaho Code, unless the documents presented by the executive authority making the demand show that the accused was present in the demanding state at the time of the commission of the alleged crime, and that he thereafter fled from that state, and is now in this state, and that he is lawfully charged by indictment found or by an information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted or found guilty of a crime in that state and has escaped from confinement or broken the terms of his bail, probation or parole. [1927, ch. 29, § 5, p. 31; I.C.A., § 19-4605; am. 1983, ch. 130, § 1, p. 326.]

Sec. to sec. ref. This section is referred to in § 19-4506.

Cited in: *Videan v. State*, 68 Idaho 269, 194 P.2d 615 (1948).

ANALYSIS

Affidavit before magistrate.

Denial of petition.

Fugitive status.

In general.

Presence in demanding state.

Review of demanding state statute.

Affidavit before Magistrate.

Since a complaint sworn to before a magistrate may serve as an affidavit in compliance with this section, where complaint on which rendition warrant was based set forth in detail alleged failure of accused to furnish support for his minor child, was sworn to by mother before judge of a California municipal

court, and authenticated by the district attorney and governor of California, rendition warrant was valid, even though it stated that alleged accused stood charged by complaint instead of by affidavit made before a magistrate of California, in absence of proof that municipal court judge was not a magistrate under California law. *In re Martz*, 83 Idaho 72, 357 P.2d 940 (1960).

A criminal complaint sworn to before a magistrate charging the accused with commission of a crime in the demanding state which he could not have committed without being personally present therein is a sufficient showing that the accused was present in the demanding state at the time the alleged crime was committed. *Fenton v. State*, 91 Idaho 149, 417 P.2d 415 (1966).

Denial of Petition.

Petitioner, a fugitive from justice from another state on a charge of second degree

burglary, whose petition for writ of habeas corpus was denied by district court, was entitled to a hearing on right to bail pending appeal, and determination of right to bail was subject to exercise of sound legal discretion by the district court. In *re Haney*, 77 Idaho 166, 289 P.2d 945 (1955).

Fugitive Status.

Where documents delivered by the governor of Wyoming sufficiently showed that the defendant was in Wyoming at the time of the alleged crime, that he thereafter left Wyoming and was in Idaho, there was a sufficient basis to establish fugitive status. *Jacobsen v. State*, 99 Idaho 45, 577 P.2d 24 (1978).

Where fugitive status is challenged by the accused, the proper role of the courts in an asylum state is to examine the sufficiency of the allegations made by the demanding state and to determine whether they show that the accused is a fugitive, and two constraints apply to this examination: first, the extradition warrant of the Idaho governor is *prima facie* evidence of the fugitive status; secondly, the allegations of fact contained in properly authenticated documents, submitted in support of the extradition demand, are assumed to be true. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

The absence of fugitive status is a valid defense to extradition. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

In General.

It was not necessary that the papers for the extradition of one on probation for crime in the state of Washington and accused of violation of probation show that his probation had been revoked. *Richardson v. State*, 90 Idaho 566, 414 P.2d 871 (1966).

Presence in Demanding State.

Where a habeas corpus petitioner shows by clear and convincing evidence that he was not present in the demanding state at the time of the commission of the crime for which he stands accused, his petition should be granted; however, the criminal need not do within the demanding state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Where the state of Oregon sought the return of the defendant parent on a felony charge of custodial interference in the first degree, and the allegations in the extradition documents showed that the defendant had removed his child from Oregon, that he

avoided contact with the custodial parent (his former wife), that he quit his job in Oregon without notice the day he was to return the child to his former wife and joined the child in another state, and that he was indicted in Oregon for such acts, the court properly determined that the defendant was a fugitive subject to extradition, despite the defendant's contention that he was not in the state of Oregon when the crime was alleged to have been committed. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Review of Demanding State Statute.

Where petition by parent of juvenile charged with murder in a fugitive warrant challenged the validity of the demanding state's indictment charging a minor as an adult, asylum state in extradition proceeding should not review the constitutionality of the statute alleged to have been violated in the demanding state. *Snyder v. State*, 95 Idaho 643, 516 P.2d 700 (1973).

Collateral References. Treaty regulation of extradition. 4 A.L.R. 1395; 134 A.L.R. 882.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition. 11 A.L.R. 1410.

Mission or motive of defendant in going to asylum state as affecting right to extradite him. 13 A.L.R. 415.

Right to try one for offense other than that named in extradition proceedings. 21 A.L.R. 1405.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition. 32 A.L.R. 1167; 54 A.L.R. 281.

Extradition of fugitive in custody under charge in asylum state. 42 A.L.R. 585.

Extradition, as a fugitive from justice, of one who left the demanding state by official permission. 67 A.L.R. 1480.

Bar of limitations as proper subject of investigation in extradition proceedings. 77 A.L.R. 902.

Extradition of escaped or paroled convict, or one at liberty on bail. 78 A.L.R. 419.

Recitals in rendition warrant as to copy of indictment of affidavit, sufficiency of. 89 A.L.R. 595.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject to inquiry. 94 A.L.R. 1493.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings. 114 A.L.R. 693.

Allegation or proof of presence of accused in demanding state at time of commission of alleged crime or that accused is a fugitive, sufficiency of statements in demanding papers as. 135 A.L.R. 973.

19-4506. Extradition of persons not present in demanding state at time of commission of crime. — The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 19-4505, Idaho Code, with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand. The provisions of this act not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom. [1927, ch. 29, § 6, p. 31; I.C.A., § 19-4606; am. 1983, ch. 130, § 2, p. 326.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

Sec. to sec. ref. This section is referred to in § 19-4505.

Cited in: In re Martz, 83 Idaho 72, 357 P.2d 940 (1960).

ANALYSIS

Conditional return.

Indictment.

Insufficient demands.

Conditional Return.

A convict serving a sentence in another state was not denied due process of law in being returned to that state after trial in Idaho pursuant to an extradition agreement between the governors of the two states that, if the convict's prosecution in Idaho terminated in any manner other than a sentence of death, he would be returned on demand to the state where he was serving such sentence. *Bullis v. Hocker*, 409 F.2d 1380 (9th Cir. 1969), cert. denied, 395 U.S. 915, 89 S. Ct. 1763, 23 L. Ed. 2d 228 (1969).

Indictment.

The provisions of the uniform reciprocal enforcement of support act does not require an indictment in the requesting state in order

to extradite for noncompliance with an order of court to support minor children and any such requirement found elsewhere is not controlling. *Deer v. Wilcox*, 94 Idaho 321, 487 P.2d 684 (1971).

Insufficient Demands.

A complaint sworn to before a justice of the peace by a divorced wife charging nonsupport of minor children is not a substitute for an indictment as provided in this section and is insufficient to authorize the governor of Idaho to honor an application for extradition. *Videan v. State*, 68 Idaho 269, 194 P.2d 615 (1948).

Where the warrant for extradition states that the person whose surrender is demanded stands charged with the crime of "nonsupport," but the supporting affidavit of the prosecuting attorney of the demanding state directed that the count containing this charge be disregarded and considered as surplusage, the issuance of an extradition warrant was unauthorized. *Videan v. State*, 68 Idaho 269, 194 P.2d 615 (1948).

Collateral References. Statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, constitutionality, construction, and application of. 151 A.L.R. 239.

19-4507. Governor's warrant of arrest — Issuance and recitals. —

If the governor shall decide that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to a sheriff, marshal, coroner, or other person whom he may think fit to entrust, with the execution thereof; and the warrant must substantially recite the facts necessary to the validity of its issue. [S.L. 1927, ch. 29, § 7, p. 31; I.C.A., § 19-4607.]

Basis of Warrant.

The governor's warrant should be based upon a charge contained in some document accompanying the extradition proceedings and the governor of Idaho may not include in

this warrant a charge not contained in some document accompanying the extradition proceedings. *Videan v. State*, 68 Idaho 269, 194 P.2d 615 (1948).

19-4508. Execution of warrant — Manner and place. — Such warrant shall authorize the officer or other person to whom directed to arrest the accused at any place where he may be found within the state and to command the aid of all sheriffs and other peace officers in the execution of the warrant, and to deliver the accused subject to the provisions of this act, to the duly authorized agent of the demanding state. [1927, ch. 29, § 8, p. 31; I.C.A., § 19-4608.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

19-4509. Authority of arresting officer. — Every such officer or other person empowered to make the arrest, shall have the same authority in arresting the accused to command assistance therein, as sheriffs and other officers have by law in the execution of any criminal process directed to them, with the like penalties against those who refuse their assistance. [1927, ch. 29, § 9, p. 31; I.C.A., § 19-4609.]

19-4510. Rights of accused — Right to apply for writ of habeas corpus. — No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of record in this state, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. And when such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state. [1927, ch. 29, § 10, p. 31; I.C.A., § 19-4610.]

Cited in: *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978).

ANALYSIS

Applicability.
 Authority of court.
 Fugitive status.
 Hearing.
 Presence in demanding state.
 Right to attorney.

Applicability.

This section pertains to a person who is taken into custody in Idaho for delivery to an agent under a Governor's warrant for extradition to another state and whether these or similar rights were available to defendant upon his arrest in Colorado was a matter controlled by the statutes of that state, not of Idaho. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

Authority of Court.

The power of a court in a state whose governor has granted the extradition of a person wanted in another state, is limited to deciding: (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Fugitive Status.

Where fugitive status is challenged by the accused, the proper role of the courts in an asylum state is to examine the sufficiency of the allegations made by the demanding state and to determine whether they show that the accused is a fugitive, and two constraints apply to this examination: first, the extradi-

tion warrant of the Idaho governor is prima facie evidence of the fugitive status; secondly, the allegations of fact contained in properly authenticated documents, submitted in support of the extradition demand, are assumed to be true. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

The absence of fugitive status is a valid defense to extradition. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Hearing.

Petitioner, a fugitive from justice from another state on a charge of second degree burglary, whose petition for writ of habeas corpus was denied by district court, was entitled to a hearing on right to bail pending appeal, and determination of right to bail was subject to exercise of sound legal discretion by the district court. *In re Haney*, 77 Idaho 166, 289 P.2d 945 (1955).

Presence in Demanding State.

Where a habeas corpus petitioner shows by clear and convincing evidence that he was not present in the demanding state at the time of the commission of the crime for which he stands accused, his petition should be granted; however, the criminal need not do within the demanding state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Where the state of Oregon sought the re-

turn of the defendant parent on a felony charge of custodial interference in the first degree, and the allegations in the extradition documents showed that the defendant had removed his child from Oregon, that he avoided contact with the custodial parent (his former wife), that he quit his job in Oregon without notice the day he was to return the child to his former wife and joined the child in another state, and that he was indicted in Oregon for such acts, the court properly determined that the defendant was a fugitive subject to extradition, despite the defendant's contention that he was not in the state of Oregon when the crime was alleged to have been committed. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Right to Attorney.

The authority of the arresting state is limited to determining that the extradition documents are in order, that the petitioner is charged with a crime in the demanding state and that the petitioner is a fugitive; the statutory right to counsel does not give rise to a constitutional right to an attorney because extradition is not a critical stage of the criminal proceedings; however, under the Uniform Criminal Extradition Act, §§ 19-4501 through 19-4527, a person arrested upon a fugitive warrant has the right to demand legal counsel to test the arrest. *State v. Waggoner*, 124 Idaho 716, 864 P.2d 162 (Ct. App. 1991).

Collateral References. Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake. 25 A.L.R.4th 157.

19-4511. Penalty for noncompliance with preceding section. — Any officers who shall deliver to the agent for extradition of the demanding state a person in his [their] custody under the governor's warrant in disobedience to the last section shall be guilty of a misdemeanor, and on conviction shall be fined not more than \$1000, or be imprisoned in the county jail not more than six (6) months, or both. [1927, ch. 29, § 11, p. 31; I.C.A., § 19-4611.]

Compiler's notes. The bracketed word "their" was inserted by the compiler.

19-4512. Confinement in jail when necessary. — The officer or person executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may when necessary confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with expense of keeping. [1927, ch. 29, § 12, p. 31; I.C.A., § 19-4612.]

19-4513. Arrest prior to requisition. — (1) Any judge or magistrate of the state of Idaho shall issue a warrant directing any peace officer to arrest the person named in said warrant when the person named in said warrant has been charged with a felony in another state and having absented himself from that state and is believed to be in this state, provided that:

(a) A peace officer of this state shall submit an affidavit that the person named in the warrant has absented himself from a sister state having been charged with a felony, together with a certified copy of the complaint and warrant of arrest issued by a court of record in a sister state to the court in support of issuance of the warrant; or

(b) A peace officer of any other state shall submit an affidavit alleging that the person to be named in the warrant has absented himself from a sister state having committed a felony, together with a certified copy of the complaint and record of arrest issued by a court of record in a sister state to the court in support of issuance of the warrant.

(2) The warrant provided for in subsection (1) shall have a certified copy of the supporting documents attached.

(3) Upon arrest of the person charged, wherever he may be found in the state, he shall be brought before a court of convenient access to be held as provided in section 19-4514, Idaho Code.

(4) The supporting documents provided for in subsection (1)(a) and (b) shall be sufficient evidence to support a finding of probable cause by the court to issue the warrant without additional evidence. [I.C., § 19-4513, as added by 1979, ch. 228, § 2, p. 626.]

Compiler's notes. Former section 19-4513 which comprised S.L. 1927, ch. 29, § 13, p. 31; I.C.A., § 19-4613 was repealed by S.L. 1979, ch. 228, § 1.

Sec. to sec. ref. This section is referred to

in §§ 19-4514, 19-4515.

Cited in: State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1983); Elder v. Holloway, 874 F. Supp. 278 (D. Idaho 1995).

19-4514. Arrest without a warrant. — (1) The arrest of a person may be lawfully made by a peace officer without a warrant upon reasonable information that the accused stands charged with a felony by the courts of another state; but when so arrested, the accused must be taken forthwith before a judge or magistrate where he shall be advised of the reason for his arrest, his right to bond, his right of counsel, and his right against self-incrimination.

(2) Within ten (10) days if the accused is incarcerated, and within twenty (20) days if the accused is out on bond, the court must hold a hearing to determine whether a warrant and complaint shall issue upon the basis set forth in section 19-4513, Idaho Code. [I.C., § 19-4514, as added by 1979, ch. 228, § 3, p. 626.]

Compiler's notes. Former section 19-4514 which comprised S.L. 1927, ch. 29, § 14, p. 31; I.C.A., § 19-4614; am. 1965, ch. 243, § 1, p. 595; am. 1969, ch. 251, § 1, p. 782 was re-

pealed by S.L. 1979, ch. 228, § 1.

Sec. to sec. ref. This section is referred to in §§ 19-4513, 19-4515.

19-4515. Commitment to await requisition. — Upon arrest of the accused, with or without warrant, as specifically provided for in sections 19-4513 or 19-4514, Idaho Code, the court shall commit the accused to jail, by warrant, reciting the accusation for such time as is necessary to enable the arrest of the accused to be made under a warrant of the governor or a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged. [I.C., § 19-4515, as added by 1979, ch. 228, § 4, p. 626.]

Compiler's notes. Former section 19-4515 which comprised S.L. 1927, ch. 29, § 15, p. 31; I.C.A., § 19-4615 was repealed by S.L. 1979, ch. 228, § 1.

ANALYSIS

In general.

Probable cause.

In General.

A prerequisite warrant committing petitioner to jail could not issue without a judicial finding that petitioner was the identical person charged with felony check offenses in South Dakota, and that petitioner probably committed the crime and that petitioner fled from South Dakota justice. *Struve v. Wilcox*,

99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

Probable Cause.

Considering that a person arrested either with or without a warrant, as a fugitive from the justice of another state, may be detained indefinitely under the provisions of the prerequisite detention statutes, and that such a person is not a candidate for either a preliminary hearing or for a speedy trial in Idaho, such a person is entitled to the safeguard of a probable cause hearing. *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978), appeal dismissed, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979).

19-4516. Bail except in capital and life imprisonment cases — Condition and requisites of bond. — Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, and except as provided in section 20-209F(3), Idaho Code, the judge or magistrate must admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of this state. [1927, ch. 29, § 16, p. 31; I.C.A., § 19-4616; am. 2002, ch. 130, § 1, p. 360.]

Compiler's notes. Section 2 of S.L. 2002, ch. 130 is compiled as § 20-209F.

Sec. to sec. ref. This section is referred to in § 19-4517.

Hearing on Right to Bail.

Petitioner, a fugitive from justice from another state on a charge of second degree

burglary, whose petition for writ of habeas corpus was denied by district court, was entitled to a hearing on right to bail pending appeal, and determination of right to bail was subject to exercise of sound legal discretion by the district court. In *re Haney*, 77 Idaho 166, 289 P.2d 945 (1955).

19-4517. Procedure if no arrest made. — If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, the judge or magistrate may discharge him or may recommit him to a further day, or may again take bail for his appearance and surrender, as provided in section 19-4516; and at the expiration of the second period of commitment, or if he has been bailed and appeared according to the terms of his bond or undertaking, the judge or

magistrate may either discharge him, or may require him to enter into a new bond or undertaking, to appear and surrender himself at another day. [1927, ch. 29, § 17, p. 31; I.C.A., § 19-4617.]

Cited in: *Struve v. Wilcox*, 99 Idaho 205, 579 P.2d 1188 (1978).

19-4518. Forfeiture of bail. — If the prisoner is admitted to bail, and fails to appear and surrender himself according to the condition of his bond, the court, by proper order, shall declare the bond forfeited; and recovery may be had thereon in the name of the state as in the case of other bonds or undertaking [undertakings] given by the accused in criminal proceedings within this state. [1927, ch. 29, § 18, p. 31; I.C.A., § 19-4618.]

Compiler's notes. The bracketed word "undertakings" was inserted by the compiler.

Cross ref. Apportionment of forfeiture, § 19-4705.

19-4519. Procedure if prosecution already instituted. — If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor at his discretion either may surrender him on the demand of the executive authority of another state, or may hold him until he has been tried and discharged, or convicted and punished in this state. [1927, ch. 29, § 19, p. 31; I.C.A., § 19-4619.]

Collateral References. Surrender of convict to authorities of other jurisdiction as precluding punishment or further punish-

ment under original conviction. 147 A.L.R. 941.

19-4520. Guilt or innocence of accused, when inquired into. — The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime. [1927, ch. 29, § 20, p. 31; I.C.A., § 19-4620.]

Cited in: *Proctor v. Skinner*, 104 Idaho 426, 659 P.2d 779 (Ct. App. 1982).

In General.

It was not necessary that the papers for the extradition of one on probation for crime in the state of Washington and accused of violation of probation show that his probation had been revoked or that he had in fact violated his probation. *Richardson v. State*, 90 Idaho 566, 414 P.2d 871 (1966).

In extradition matters the asylum state is not authorized to inquire into the guilt or

innocence of the accused as to the charged crime; the innocence or guilt of the accused is a question for the courts of the demanding state. *Jacobsen v. State*, 99 Idaho 45, 577 P.2d 24 (1978).

An asylum state is not authorized to inquire into the guilt or innocence of the accused. This question is left for the determination of the state requesting extradition. *Kerr v. Watson*, 103 Idaho 478, 649 P.2d 1234 (Ct. App. 1982).

Collateral References. See collateral references to § 19-4505.

19-4521. Governor may recall warrant or issue alias. — The governor may recall his warrant of arrest, or may issue another warrant whenever he deems proper. [1927, ch. 29, § 21, p. 31; I.C.A., § 19-4621.]

19-4522. Fugitives from this state. — Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state from the chief executive of any other state, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed. [1927, ch. 29, § 22, p. 31; I.C.A., § 19-4622; am. 1990, ch. 314, § 1, p. 858.]

ANALYSIS

Bench warrant.

Charging with crime required.

Bench Warrant.

The court's issuance of the bench warrant was within its jurisdiction under the Interstate Corrections Compact, as an integral part of the extradition process, rather than under the court's previously exercised sentencing power. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

Charging With Crime Required.

Before a fugitive may be extradited, he must be charged with a crime within the jurisdiction of the demanding state. *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977).

Opinions of Attorney General. Counties are responsible for the cost of extraditing a prisoner charged with violation of a state statute where the violation was committed within city limits and investigated by city officers. OAG 84-4.

19-4523. Manner of applying for requisition. — (a) When the return to this state of a person charged with crime in this state is required, the prosecuting attorney of the county in which the offense is committed shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the approximate time, place and circumstances of its committal, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim.

(b) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, or who has an unsatisfied term of imprisonment or other supervision remaining pursuant to his conviction of a crime and who is absent from this state for any reason, the prosecuting attorney of the county in which the offense was committed, the commission of pardons and parole, the director of the department of correction or his designee, or the head of any facility or institution operated by the department of correction, or sheriff of the county from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, or other circumstances of his absence from this

state, and the state in which he is believed to be, including the location of the person therein at the time application is made.

(c) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two (2) certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, commission of pardons and parole, director of the department of correction, correctional facility head, or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One (1) copy of the application with the action of the governor indicated by indorsement thereon, and one (1) of the certified copies of the indictment or complaint or information, or judgment of conviction and sentence, and affidavit, shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition. [1927, ch. 29, § 23, p. 31; I.C.A., § 19-4623; am. 1990, ch. 314, § 2, p. 858; am. 2002, ch. 28, § 1, p. 34.]

Bench Warrant.

The court's issuance of the bench warrant was within its jurisdiction under the Interstate Corrections Compact, as an integral part of the extradition process, rather than under the court's previously exercised sentencing power. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

Opinions of Attorney General.

Counties are responsible for the cost of extraditing a prisoner charged with violation of a state statute where the violation was committed within city limits and investigated by city officers. OAG 84-4.

19-4524. Exemption from civil process. — A person brought into this state on extradition based on a criminal charge, shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is returned, until he has been convicted in the criminal proceeding, or if acquitted, until he has had ample opportunity to return to the state from which he was extradited. [1927, ch. 29, § 24, p. 31; I.C.A., § 19-4624.]

ANALYSIS

Civil contempt.
Criminal charges.

Civil Contempt.

Petitioner extradited from another state to face criminal charges for kidnaping of child was not subject to process on civil contempt suit, hence court exceeded its jurisdiction in sentencing petitioner to jail for contempt, and petitioner was entitled to release on writ of

habeas corpus. *Ex parte Dodd*, 72 Idaho 351, 241 P.2d 359 (1952).

Criminal Charges.

No immunity similar to the immunity granted by this section from civil process exists against prosecution on outstanding criminal charges; once the fugitive is present as a result of interstate extradition, he may be tried for other crimes in the demanding state. *State v. Barnhouse*, 111 Idaho 673, 726 P.2d 785 (Ct. App. 1986).

19-4525. No right of asylum. — After a person has been brought back to this state upon extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here, as well as that specified in the requisition for his extradition. [1927, ch. 29, § 25, p. 31; I.C.A., § 19-4625.]

Cited in: State v. Barnhouse, 111 Idaho 673, 726 P.2d 785 (Ct. App. 1986).

19-4526. Interpretation. — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1927, ch. 29, § 26, p. 31; I.C.A., § 19-4626.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

Section 28 of S.L. 1927, ch. 29 provides as follows:

"Sections 9339 to 9347, inclusive, of the compiled statutes, and all acts or parts of acts and administrative rules inconsistent with this act are hereby repealed: provided, that extradition proceedings pending at the time this act takes effect shall be continued and terminated under the provisions of the laws and rules existing at the time said proceedings were initiated."

Section 27 of S.L. 1927, ch. 29 provides as

follows: "If any part of this act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this act."

Uniformity of Construction.

Since the Uniform Criminal Extradition Act adopted by Idaho should be interpreted and construed so as to make the law uniform, that part of § 19-4503 requiring a copy of warrant with extradition papers is void, since it is contrary to the terms of the federal statute governing extradition. In re Williams, 76 Idaho 173, 279 P.2d 882 (1955).

19-4527. Short title. — This act may be cited as the Uniform Criminal Extradition Act. [1927, ch. 29, § 29, p. 31; I.C.A., § 19-4629.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

Former § 19-4630 provided that S.L. 1927,

ch. 29 should become effective July 1, 1927. It was omitted as obsolete.

Cited in: In re Williams, 76 Idaho 173, 279 P.2d 882 (1955).

19-4528. Claims for services of executive agents. — When the governor of this state, in the exercise of the authority conferred by section 2 of article 4 of the Constitution of the United States, or by the laws of this state, demands from the executive authority of any state or territory of the United States, or of any foreign government, the surrender to the authorities of this state of a fugitive from justice, who has been found and arrested in such state, territory, or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the board of examiners and paid out of the state treasury, provided that in any case where a person against whom criminal proceedings are pending in any court of this state is to be brought into this state for such proceedings, whether with or without any demand or proceedings by the governor of this state and there is no appropriation of state funds available for the purpose at the time, reasonable compensation for the services of any person employed to bring the defendant in such criminal proceedings to this state and his expenses and the expenses on account of the said defendant may be allowed and paid at the discretion of the board of county commissioners of the county where such criminal proceedings are pending from the general fund of said county, but no compensation for services as distinguished from expenses other than the regular salary shall be allowed any sheriff or deputy sheriff from either state or county funds. [R.S., § 8425; am. R.C. & C.L., § 8425; C.S., § 9348; am. 1927, ch. 44, § 1, p. 59; I.C.A., § 19-4631.]

Cross ref. Board of prison commissioners and examiners, examination of claims against state, Const., art. 4, § 18.

ANALYSIS

Appointment of executive agent.
Expense of executive agent.

Appointment of Executive Agent.

The governor has a right to the appointment of an agent to receive and return a fugitive from justice under requisition papers, but not to fix any terms as to his fees. *Settle v. Sterling*, 1 Idaho 259.

Such officer is entitled to the fees and emoluments fixed by law for his services. *Settle v. Sterling*, 1 Idaho 259.

Expense of Executive Agent.

The expense incurred by an executive agent

in going to another state to bring back a fugitive from justice is a charge against the state, under this section. *Kroutinger v. Board of Exmrs.*, 8 Idaho 463, 69 P. 279 (1902).

If a deputy sheriff has been designated as the agent of the state to receive a fugitive from justice, his claim for services is a charge against the state, not against the county in which he is deputy sheriff. *Roberts v. Board of County Comm'rs*, 17 Idaho 379, 105 P. 797 (1909).

Opinions of Attorney General. Counties are responsible for the cost of extraditing a prisoner charged with violation of a state statute where the violation was committed within city limits and investigated by city officers. OAG 84-4.

19-4529. Rewards for services prohibited. — No compensation, fee, or reward of any kind can be paid to, or received by, a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided for in such section. [R.S., R.C., & C.L., § 8426; C.S., § 9349; I.C.A., § 19-4632.]

19-4530. Rendition of accused persons — Affidavit for warrant — Documents required — Notice to prosecuting attorney. — (a) If a person who has been charged with crime in another state and released from custody prior to final judgment, including the final disposition of any appeal, is alleged to have violated the terms and conditions of his release, and is present in this state, a designated agent of the court, judge or magistrate which authorized the release may request the issuance of a warrant for the arrest of the person and an order authorizing his return to the demanding court, judge or magistrate. Before the warrant is issued, the designated agent must file with the clerk of the district court of the county wherein the person is, or is alleged to be, located, the following documents:

- (1) an affidavit stating the name and whereabouts of the person whose removal is sought, the crime with which the person was charged, the time and place of the crime charged, and the status of the proceedings against him;
- (2) a certified copy of the order or other document specifying the terms and conditions under which the person was released from custody; and
- (3) a certified copy of an order of the demanding court, judge or magistrate stating the manner in which the terms and the conditions of the release have been violated and designating the affiant its agent for seeking removal of the person.

(c) Upon initially determining that the affiant is a designated agent of the demanding court, judge or magistrate, and that there is probable cause for believing that the person whose removal is sought has violated the terms or

conditions of his release, the district judge of the county where the documents are filed shall issue a warrant to a law enforcement officer of this state for the person's arrest.

(d) The district judge shall notify the prosecuting attorney of the county where the documents are filed of his action and shall direct him to investigate the case to ascertain the validity of the affidavits and documents required by subsection (a) and the identity and authority of the affiant. [1969, ch. 129, § 1, p. 395.]

19-4531. Arrest — Notification of rights — Waiver of hearing — Conditions of release. — (a) The person whose removal is sought shall be brought before the district judge immediately upon arrest pursuant to the warrant; whereupon the district judge shall set a time and place for hearing, and shall advise the person of his right to have the assistance of counsel, to confront witnesses against him, and to produce evidence in his own behalf at the hearing.

(b) The person whose removal is sought may at this time in writing waive the hearing and agree to be returned to the demanding court, judge or magistrate. If a waiver is executed, the district judge shall issue an order pursuant to section 19-4532.

(c) The district judge may impose conditions of release authorized by the laws of this state which will reasonably assure the appearance at the hearing of the person whose removal is sought. [1969, ch. 129, § 2, p. 395.]

19-4532. Hearing — Order of court. — The prosecuting attorney shall appear at the hearing and report to the district judge the results of his investigation. If the district judge finds that the affiant is a designated agent of the demanding court, judge or magistrate and that the person whose removal is sought was released from custody by the demanding court, judge or magistrate, and that the person has violated the terms or conditions of his release, the district judge shall issue an order authorizing the return of the person to the custody of the demanding court, judge or magistrate forthwith. [1969, ch. 129, § 3, p. 395.]

Compiler's notes. Section 4 of S.L. 1969, ch. 129 read: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does

not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

19-4533. Construction. — This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1969, ch. 129, § 5, p. 395.]

Compiler's notes. The words "this act" refer to S.L. 1969, ch. 129 compiled as §§ 19-4530 — 19-4534.

19-4534. Short title. — This act may be cited as the "Uniform Rendition of Accused Persons Act." [1969, ch. 129, § 6, p. 395.]

Compiler's notes. For meaning of words "this act" see compiler's note to § 19-4533.

CHAPTER 46

PROCEEDINGS FOR THE PRODUCTION OF PRISONERS

SECTION.

19-4601. Order for production of prisoner.

19-4601. Order for production of prisoner. — When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made. [Cr. Prac. 1864, § 669; R.S., R.C., & C.L., § 8435; C.S., § 9350; I.C.A., § 19-4701.]

Cross ref. Witness, examination of prisoner as, when confined in prison, §§ 9-711 — 9-713.

ANALYSIS

Discretion.

Review.

Discretion.

The necessity to have a state prisoner brought before any court is determined by that court, and this section vests discretion in the judge. *Reed v. Foster*, 130 Idaho 74, 936 P.2d 1316 (1997).

Review.

Review of a lower court's ruling regarding

the issue of an order for production of a state prisoner before that court is one based on abuse of discretion. *Reed v. Foster*, 130 Idaho 74, 936 P.2d 1316 (1997).

Opinions of Attorney General. It is the responsibility of the sheriff and an expense to his or her county to transport an inmate from the prison back to the county where the inmate's attendance in court is required; however, in the case of female prisoners, clear statutory language places the responsibility upon the state board of corrections. OAG 83-11.

CHAPTER 47

DISPOSITIONS OF FINES, FORFEITURES, AND COSTS

SECTION.

19-4701. Fines, forfeitures, and costs — Disposition — Satisfaction of judgment.

19-4702. Disposition of other funds.

19-4703, 19-4704. [Repealed.]

19-4705. Payment of fines and forfeitures — Satisfaction of judgment — Disposition — Apportionment.

SECTION.

19-4706. Remission of fines to state treasurer.

19-4707. Designation of other than clerk of court to collect fines.

19-4708. Collection of debts owed to courts — Contracts for collection.

19-4701. Fines, forfeitures, and costs — Disposition — Satisfaction of judgment. — All moneys collected on account of fines, forfeitures or costs pursuant to the judgment of any court of the state shall be remitted to the court in which such judgment was rendered, whereupon such judgment shall be satisfied pro tanto, by entry in the docket of such court, and the judge or clerk of such court shall remit all such moneys to the county treasurer who shall, under the orders of the county auditor, apportion the proceeds of all such fines and forfeitures to the general school fund of the

county and all costs to the current expense fund of such county. [1903, p. 433, § 1; reen. R.C. & C.L., § 8440; C.S., § 9351; am. 1929, ch. 52, § 1, p. 71; I.C.A., § 19-4801.]

Compiler's notes. This section as to fines and forfeitures is superseded by § 19-4705, effective January 11, 1971.

ANALYSIS

Application of section.

Fine imposed by supreme court.

Application of Section.

The "public moneys" referred to in § 18-5701 and as defined in § 18-5703 include all of the moneys which came into the hands of the defendant justice of the peace in his official capacity and former § 31-3016 required all fees and costs received by defen-

dant in both civil and criminal cases to be transmitted to the county treasurer and this section likewise required fines, forfeitures and costs to be remitted to the county treasurer. *State v. Bell*, 84 Idaho 153, 370 P.2d 508 (1962).

Fine Imposed by Supreme Court.

Fine imposed on corporation for illegal practice of law by agreeing to furnish county the services of expert bond attorneys to aid in a bond issue was ordered paid to the clerk of the supreme court pursuant to this section. *Wayne v. Murphey-Favre & Co.*, 56 Idaho 788, 59 P.2d 721 (1936).

19-4702. Disposition of other funds. — Whenever any money shall be or shall come into the possession of any clerk of court, or other public officer authorized to receive the same, and no fund is specified by law into which such money shall be paid, or purpose to which the same shall be applied, the officer in possession of, or who may come into the possession of any money in such cases, shall pay the same to the state treasurer, who shall add the same to the permanent school fund, and such money shall thereafter be and remain a part of said fund. [1913, ch. 70, § 1, p. 307; reen. C.L., § 8440a; C.S., § 9352; I.C.A., § 19-4802.]

Money in Gambling Device.

Money found in gambling devices seized in raid on alleged gambling premises and used as evidence in the prosecution was an integral part of the devices, coming lawfully into possession of public officers, whose duty it was,

after use as evidence, to pay over to state treasurer for benefit of permanent school fund, and was not to be returned, after use as evidence, to owner of gambling devices. *State v. McNichols*, 63 Idaho 100, 117 P.2d 468 (1941).

19-4703. Judgment for costs. [Repealed.]

Compiler's notes. This section, which comprised R.S., § 8441; am. R.C. & C.L., § 8441; C.S., § 9353; I.C.A., § 19-4803, and

was repealed by S.L. 1969, ch. 139, § 3, effective January 11, 1971. For present law see § 31-3201A.

19-4704. Apportionment of funds realized from judgment. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1899, p. 379, § 4; reen. R.C. & C.L., § 8442; C.S., § 9354; I.C.A., § 19-4804,

was repealed by S.L. 1969, ch. 111, § 11 and S.L. 1969, ch. 139, § 3, effective January 11, 1971.

19-4705. Payment of fines and forfeitures — Satisfaction of judgment — Disposition — Apportionment. — (a) All fines and forfeitures collected pursuant to the judgment of any court of the state shall be remitted to the court in which the judgment was rendered. The judgment shall then be satisfied by entry in the docket of the court. The clerk of the court shall

daily remit all fines and forfeitures to the county auditor who shall at the end of each month apportion the proceeds according to the provisions of this act. Other existing laws regarding the disposition of fines and forfeitures are hereby repealed to the extent such laws are inconsistent with the provisions of this act except as provided in section 49-1013(3), Idaho Code.

(b) Fines and forfeitures remitted for violations of fish and game laws shall be apportioned two and one-half percent (2 ½%) to the state treasurer for deposit in the state general account, ten percent (10%) to the search and rescue account, twenty-two and one-half percent (22 ½%) to the district court fund and sixty-five percent (65%) to the fish and game fund.

(c) Fines and forfeitures remitted for violations of state motor vehicle laws, for violation of state driving privilege laws, and for violation of state laws prohibiting driving while under the influence of alcohol, drugs or any other intoxicating substances, shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, forty-five percent (45%) to the state treasurer for deposit in the highway distribution account, twenty-two and one-half percent (22 ½%) to the district court fund and twenty-two and one-half percent (22 ½%) to the state treasurer for deposit in the public school income fund; provided, however, that fines and forfeitures remitted for violation of state motor vehicle laws, for violation of state driving privilege laws, and for violation of state laws prohibiting driving while under the influence of alcohol, drugs or any other intoxicating substances, where an arrest is made or a citation is issued by a city law enforcement official, or by a law enforcement official of a governmental agency under contract to provide law enforcement services for a city, shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the city whose officer made the arrest or issued the citation.

(d) Fines and forfeitures remitted for violation of any state law not involving fish and game laws, or motor vehicle laws, or state driving privilege laws, or state laws prohibiting driving while under the influence of alcohol, drugs or any other intoxicating substances, shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the district court fund of the county in which the violation occurred.

(e) Fines and forfeitures remitted for violation of county ordinances shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the district court fund of the county whose ordinance was violated.

(f) Fines and forfeitures remitted for violation of city ordinances shall be apportioned ten percent (10%) to the state treasurer of which ninety percent

(90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the city whose ordinance was violated.

(g) Fines and forfeitures remitted for violations not specified in this act shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the district court fund of the county in which the violation occurred except in cases where a duly designated officer of any city police department or city law enforcement official shall have made the arrest for any such violation, in which case ninety percent (90%) shall be apportioned to the city whose officer made the arrest.

(h) Fines and forfeitures remitted for violations involving registrations of motorcycles or motor-driven cycles used off highways, snowmobiles, or use of winter recreation parking areas shall be apportioned ten percent (10%) to the state treasurer of which ninety percent (90%) shall be deposited to the state general fund and ten percent (10%) shall be deposited to the peace officers standards and training fund authorized in section 19-5116, Idaho Code, and ninety percent (90%) to the general fund of the county or city whose law enforcement official issued the citation.

(i) Fines and forfeitures remitted for violations of overweight laws as provided in section 49-1013(3), Idaho Code, shall be deposited one hundred percent (100%) into the highway distribution account.

(j) As used in this section, the term "city law enforcement official" shall include an official of any governmental agency which is providing law enforcement services to a city in accordance with the terms of a contract or agreement, when such official makes the arrest or issues a citation within the geographical limits of the city and when the contract or agreement provides for payment to the city of fines and forfeitures resulting from such service. [1969, ch. 136, § 1, p. 420; am. 1971, ch. 65, § 1, p. 149; am. 1971, ch. 102, § 1, p. 221; am. 1972, ch. 6, § 1, p. 8; am. 1976, ch. 307, § 1, p. 1052; am. 1978, ch. 285, § 1, p. 692; am. 1981, ch. 84, § 1, p. 116; am. 1983, ch. 187, § 1, p. 506; am. 1984, ch. 161, § 1, p. 399; am. 1984, ch. 195, § 2, p. 445; am. 1986, ch. 333, § 1, p. 817; am. 1991, ch. 226, § 5, p. 538; am. 1993, ch. 311, § 1, p. 1146; am. 1998, ch. 426, § 1, p. 1342; am. 2001, ch. 179, § 1, p. 604.]

Compiler's notes. The words "this act" refer to S.L. 1969, ch. 136, p. 420 compiled as §§ 19-4705 — 19-4707.

Section 2 of S.L. 1976, ch. 307 is compiled as § 31-867.

Sections 2 and 3 of S.L. 1978, ch. 285 are compiled as former §§ 49-221 and 49-2608.

Section 1 of S.L. 1984, ch. 195 contained repeals; § 3 is compiled as former § 40-405.

Section 2 of S.L. 1998, ch. 426 is compiled as § 36-412A.

Section 2 of S.L. 1971, ch. 65 declared an

emergency. Approved March 4, 1971.

Section 2 of 1972, ch. 6 read: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1972." Approved February 3, 1972.

Section 4 of S.L. 1976, ch. 307 read: "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval and retroactively to

January 1, 1976." Approved April 1, 1976. Law without governor's signature, March 31, 1976.

Section of 1984, ch. 161 declared an emergency and made the act effective retroactively to March 1, 1984. Approved April 2, 1984.

Section 4 of S.L. 1969, ch. 136 provided that the act should be effective at 12:01 a.m., January 11, 1971.

Section 2 of S.L. 1971, ch. 102 provided the act should take effect on and after January 1, 1972.

Section 6 of S.L. 1991, ch. 226 provided that the act should take effect on and after January 1, 1992.

Sec. to sec. ref. This section is referred to in §§ 18-3906, 19-5307, 23-603, 36-412A, 36-1402, 36-2116, 37-2732C, 38-130, 49-239, 67-7508, and 72-1025.

Rule to sec. ref. This section is referred to in I.C.R. 46, in M.C.R. 4, and in I.C.A.R. 11.

Opinions of Attorney General. Since M.C.R. 10 requires the use of the form, and since the form makes no provision for distribution of moneys on any basis other than those contained in the form, moneys paid by any defendant into court as part of a withheld

judgment must be paid over to the county auditor for distribution as provided for in the rule. OAG 83-1.

Subsection (d) of I.C.R. 33 and subsection (d) of M.C.R. 10 require that any moneys paid as a condition of a withheld judgment be distributed in the manner provided for in this section. OAG 83-1.

Subsection (d) of I.C.R. 33 limits the discretion of the court in directing the distribution of moneys levied as part of a withheld judgment for purposes other than those enumerated in the rule; pursuant to such subsection, any fines levied by a court as part of a withheld judgment must be turned over to the county auditor for distribution under the terms of this section. OAG 83-1.

Counties are responsible for the cost incurred by the county jail in housing a prisoner who has been charged with a state law violation committed within city limits and investigated by city police officers, and while counties may bring legal action to recoup jail costs incurred for city prisoners charged under city ordinances or state motor vehicle laws, sheriffs cannot refuse to accept city prisoners. OAG 84-4.

19-4706. Remission of fines to state treasurer. — The ten per cent (10%) apportionment of fines and forfeitures to be remitted to the state treasurer for deposit in the state general fund shall be remitted within five (5) days after the end of the month in which such fines and forfeitures were remitted to the county auditor. [1969, ch. 136, § 2, p. 420; am. 1970, ch. 64, § 1, p. 153.]

Compiler's notes. Section 2 of S.L. 1970, ch. 64 provided that the act should be effective at 12:01 a. m., January 11, 1971.

19-4707. Designation of other than clerk of court to collect fines. — If it appears that there is a necessity that fines and forfeitures be initially collected by a person other than the clerk of the district court or a person appointed by the clerk for that purpose, the Supreme Court by rule or administrative order may provide for the designation of persons to receive such fines and forfeitures. Persons so designated shall account for such fines and forfeitures in the same manner required of the clerk of the district court and shall pay such fines and forfeitures to the clerk of the district court of the county in which such fines and forfeitures are collected. [1969, ch. 136, § 3, p. 420.]

Compiler's notes. Section 4 of S.L. 1969, ch. 136, provided that the effective date of this act shall be at 12:01 A.M. on January 11, 1971.

Statute of Limitations.

The intent of this section is to the effect that when an indictment (or an information) is demurred to and the demurrer allowed, the

judgment is (a) final upon the indictment (or information) demurred to, and (b) is a bar to another prosecution for the same offense, unless the court directs the case resubmitted to the same or another grand jury, or that another information be filed. The only effect of the exception is to permit the resubmission of the case in certain instances; otherwise the

judgment on demurrer bars further prosecution for the same offense. *State v. Bilbao*, 38 Idaho 98, 222 P. 785 (1923).

19-4708. Collection of debts owed to courts — Contracts for collection. — (1) The clerks of the district court, with the approval of the administrative district judge, may enter into contracts in accordance with this section for collection services for debts owed to courts. The cost of collection shall be paid by the defendant as an administrative surcharge when the defendant fails to pay any amount ordered by the court and the court utilizes the services of a contracting agent pursuant to this section.

(2) As used in this section:

(a) "Contracting agent" means a person, firm or other entity who contracts to provide collection services.

(b) "Cost of collection" means the fee specified in contracts to be paid to or retained by a contracting agent for collection services.

(c) "Debts owed to courts" means any assessment of fines, court costs, surcharges, penalties, fees, moneys expended in providing counsel and other defense services to indigent defendants or other charges which a court judgment has ordered to be paid to the court in criminal cases, and which remain unpaid in whole or in part, and includes any interest or penalties on such unpaid amounts as provided for in the judgment or by law.

(3) The supreme court may adopt rules as deemed appropriate for the administration of this section, including procedures to be used in the negotiation and execution of contracts pursuant to this section, procedures to be followed by courts which utilize collection services under such contracts, and procedures for the compromise of debts owed to courts in criminal cases.

(4) Each contract entered into pursuant to this section shall specify the scope of work to be performed and provide for a fee to be paid to or retained by the contracting agent for collection services. Such fee shall be designated as the cost of collection, and shall not exceed thirty-three percent (33%) of the amount collected. The cost of collection shall be deducted from the amount collected but shall not be deducted from the debts owed to courts.

(5) Contracts entered into shall provide for the payment of any amounts collected to the clerk of the district court for the court in which the debt being collected originated after first deducting the collection fee. In accounting for amounts collected from any person pursuant to this section, the district court clerk shall credit the person's amount owed in the amount of the net proceeds collected and shall not reduce the amount owed by any person by that portion of any payment which constitutes the cost of collection pursuant to this section.

(6) With the appropriate cost of collection paid to the contracting agent as agreed upon in the contract, the clerk shall then distribute the amounts collected in accordance with the law. [I.C., § 19-4708, as added by 2000, ch. 330, § 1, p. 1109.]

CHAPTER 48

IDAHO STATE POLICE

SECTION.

19-4801 — 19-4803. [Repealed.]
 19-4804. [Amended and Redesignated.]
 19-4805, 19-4806. [Repealed.]
 19-4807. [Amended and Redesignated.]
 19-4808. [Repealed.]

SECTION.

19-4809. [Amended and Redesignated.]
 19-4810. [Repealed.]
 19-4811 — 19-4813. [Amended and Redesignated.]

19-4801 — 19-4803. Idaho state police force established — Superintendent — Duties. [Repealed.]

Compiler's notes. These sections, which comprised 1939, ch. 60, §§ 1-3, p. 105; am. 1955, ch. 173, §§ 1-3, p. 345; am. 1965, ch. 114, § 1, p. 220; am. 1971, ch. 136, § 3, p. 522; am. 1974, ch. 27, §§ 4, 5, p. 811; am. 1974, ch.

253, § 9, p. 1656; am. 1983, ch. 63, § 1, p. 145; am. 1984, ch. 196, § 1, p. 482; am. 1986, ch. 215, § 2, p. 549; am. 1991, ch. 30, § 1, p. 58, were repealed by S.L. 1995, ch. 116, § 4, effective March 14, 1995.

19-4804. [Amended and Redesignated.]

Compiler's notes. Former § 19-4804 was amended and redesignated as § 67-2905 by

§ 5 of S.L. 1995, ch. 116, effective March 14, 1995.

19-4805, 19-4806. Selection of personnel — Identification data. [Repealed.]

Compiler's notes. These sections, which comprised 1939, ch. 60, §§ 5, 6, p. 105; am. 1955, ch. 173, § 5, p. 345; am. 1974, ch. 27,

§ 7, p. 811, were repealed by S.L. 1995, ch. 116, § 6, effective March 14, 1995.

19-4807. [Amended and Redesignated.]

Compiler's notes. Former § 19-4807 was amended and redesignated as § 67-2906 by

§ 7 of S.L. 1995, ch. 116, effective March 14, 1995.

19-4808. Cooperation with county and local officers. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1939, ch. 60, § 8, p. 105, was repealed by S.L. 1955, ch. 173, § 7, p. 345.

19-4809. [Amended and Redesignated.]

Compiler's notes. Former § 19-4809 was amended and redesignated as § 67-2907 by

§ 8 of S.L. 1995, ch. 116, effective March 14, 1995.

19-4810. Liberal construction — Purpose. [Repealed.]

Compiler's notes. This section, which comprised 1939, ch. 60, § 10, p. 105, was

repealed by S.L. 1995, ch. 116, § 9, effective March 14, 1995.

19-4811. [Amended and Redesignated.]

Compiler's notes. Former § 19-4811 was § 10 of S.L. 1995, ch. 116, effective March 14, amended and redesignated as § 67-2908 by 1995.

19-4812. [Amended and Redesignated.]

Compiler's notes. Former § 19-4812 was March 14, 1995. Section 67-2911 was repealed amended and redesignated as former § 67-2911 by S.L. 1999, ch. 249, § 1. by § 13 of S.L. 1995, ch. 116, effective

19-4813. [Amended and Redesignated.]

Compiler's notes. Former § 19-4813 was March 14, 1995. Section 67-2912 was repealed amended and redesignated as former § 67-2912 by § 14 of S.L. 1995, ch. 116, effective repealed by S.L. 1999, ch. 249, § 1.

CHAPTER 49

UNIFORM POST-CONVICTION PROCEDURE ACT

SECTION.	SECTION.
19-4901. Remedy — To whom available — Conditions.	19-4906. Pleadings and judgment on pleadings.
19-4902. Commencement of proceedings — Verification — Filing — Service — DNA testing.	19-4907. Hearing — Evidence — Order — Presence of applicant.
19-4903. Application — Contents.	19-4908. Waiver of or failure to assert claims.
19-4904. Inability to pay costs.	19-4909. Review.
19-4905. Costs of state.	19-4910. Uniformity of interpretation.
	19-4911. Short title.

19-4901. Remedy — To whom available — Conditions. — (a) Any person who has been convicted of, or sentenced for, a crime and who claims:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy: may institute, without paying a filing fee, a proceeding under this act to secure relief.

(b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-

conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them. [1967, ch. 25, § 1, p. 42; am. 1975, ch. 8, § 1, p. 13; am. 1986, ch. 126, § 1, p. 326; am. 2001, ch. 317, § 2, p. 1126.]

Compiler's notes. The words "this act" in subsections (a)(7) and (b) refer to S.L. 1967, ch. 25, compiled as §§ 19-4901 — 19-4911.

Section 1 of S.L. 2001, ch. 317 is compiled as § 19-2719.

Comp. leg. Mont. Rev. Codes Ann. §§ 46-21-101 to 46-21-203.

Sec. to sec. ref. This chapter is referred to in §§ 19-870, 31-2220 and 31-3220A.

This section is referred to in § 19-2719.

Cited in: *Pulver v. State*, 92 Idaho 627, 448 P.2d 241 (1968); *Tramel v. State*, 92 Idaho 643, 448 P.2d 649 (1968); *Drapeau v. May*, 350 F. Supp. 1321 (D. Idaho 1972); *Conner v. State*, 95 Idaho 413, 510 P.2d 308 (1973); *State v. Morris*, 98 Idaho 328, 563 P.2d 52 (1977); *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977); *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978); *McClellan v. State*, 100 Idaho 682, 603 P.2d 1016 (1979); *State v. Smith*, 103 Idaho 135, 645 P.2d 369 (1982); *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1981); *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985); *Almada v. State*, 108 Idaho 221, 697 P.2d 1235 (Ct. App. 1985); *Schwartzmiller v. State*, 108 Idaho 329, 699 P.2d 429 (Ct. App. 1985); *Phillips v. State*, 108 Idaho 405, 700 P.2d 27 (1985); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985); *State v. Roach*, 112 Idaho 173, 730 P.2d 1093 (Ct. App. 1986); *State v. Porath*, 113 Idaho 974, 751 P.2d 670 (Ct. App. 1988); *Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (Ct. App. 1988); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *Young v. State*, 115 Idaho 52, 764 P.2d 129 (Ct. App. 1988); *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (Ct. App. 1988); *Ferrier v. State*, 115 Idaho 886, 771 P.2d 550 (Ct. App. 1989); *Simons v. State*, 116 Idaho 69, 773 P.2d 1156 (Ct. App. 1989); *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991); *Yon v. State*, 124 Idaho 821, 864 P.2d 659 (Ct. App. 1993); *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994); *Beasley v. State*, 126 Idaho 356, 883 P.2d 714 (Ct. App. 1994); *Browning v. Vernon*, 874 F. Supp. 1112 (D. Idaho 1994), *aff'd*, 44 F.3d 818 (9th Cir. 1995); *State v. Spry*, 127 Idaho 107,

897 P.2d 1002 (Ct. App. 1995); *Flores v. State*, 128 Idaho 476, 915 P.2d 38 (Ct. App. 1996); *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), *rev'd* on other grounds, 236 F.3d 523 (9th Cir. 2001); *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000); *Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001).

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Waiver.

Appealable Judgment.

Uniform Post-Conviction Procedure Act cannot be used as a method of appealing from a judgment of conviction. *Dionne v. State*, 93

Idaho 235, 459 P.2d 1017 (1969).

Where, upon defendant's appeal from denial of his motion for a new trial following his conviction for the sale of narcotics, the case was remanded for purposes of determining whether a new trial should be granted on the grounds of inadequacy of counsel it would have been procedurally inappropriate at that time for the appellate court to review defendant's appeal from the judgment denying his petition for post-conviction relief in view of the fact that a final judgment of conviction had not been entered. *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

The statutory constraint on presenting claims and issues in post-conviction proceedings is not as broad as the case law doctrine of *res judicata*. If the post-conviction application is grounded in the same facts and issues presented on appeal, summary dismissal is appropriate; however, post-conviction proceedings do not preclude claims or issues based upon facts beyond the record presented on appeal, if those facts could not, or customarily would not, have been developed in the trial on criminal charges. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

If an application is based upon the same factual question, in virtually the same factual context, as presented in the direct appeal, summary dismissal is appropriate; if an application is based upon facts outside the scope of the pending appeal, summary judgment is not appropriate, but the application may be either dismissed without prejudice or suspended until the appeal is resolved. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Post-conviction proceedings cannot be used as a substitute for appeal. *Lake v. State*, 126 Idaho 333, 882 P.2d 988 (Ct. App. 1994).

Even though defendant had fully served the sentence that was given him on the conviction for the crime of aggravated assault his petition for post-conviction relief was not moot; a felony conviction has collateral consequences and the fact that defendant has fully served his sentence does not moot defendant's appeal. *Butler v. State*, 129 Idaho 899, 935 P.2d 162 (1997).

The plaintiff's claim of prosecutorial misconduct based on statements concerning the ability of the witness to assert the Fifth Amendment privilege could have been raised during the earlier litigation that also challenged the prosecutor's conduct. Since this issue could have been raised on appeal, it was not properly before the appellate court in an appeal of a post-conviction proceeding. *Rodgers v. State*, 129 Idaho 720, 932 P.2d 348 (1997).

Defense counsel was aware of the evidence and had the opportunity to raise any objection to its nondisclosure to the district court, and because he failed to do so the record on appeal did not establish whether the evidence was disclosed or, if it was not, how the nondisclosure may have affected the results of the proceedings below, and the failure to raise the issue below precluded its consideration on appeal. *State v. Osborne*, 130 Idaho 365, 941 P.2d 337 (Ct. App. 1997).

Application.

The Idaho Rules of Civil Procedure are applicable to proceedings brought under the Uniform Post-Conviction Procedure Act. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

An application for post-conviction relief is a special proceeding, civil in nature, and is an entirely new proceeding distinct from criminal action which led to the conviction. *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

This section authorizes summary disposition of Uniform Post-Conviction Procedure Act actions, either pursuant to a motion of a party, or upon the court's own initiative. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

The Idaho appellate courts have never squarely decided whether a discovery exception may be engrafted onto the limitation period of this section. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

If necessary to avoid delay in carrying out a valid death sentence, the district court may sever non-death issues from death issues in post-conviction proceedings. Section 19-2719 applies only to claims challenging the death sentence itself. The Uniform Post-Conviction Procedure Act covers all post-conviction claims that do not involve the death sentence. *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

Application for Relief.

An applicant for post-conviction relief should raise all issues and claims in the original application. While supplements and amendments to the original application are permissible, piece-meal applications are not favored and may invoke waiver and forfeiture provisions set forth in the Post-Conviction Procedure Act. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

A defendant's initial claim for post-conviction relief from improperly imposed consecutive sentences, although failing to recite the illegality of the sentences or to raise a claim for relief under this section, sufficiently invited the district court to consider the legality of the consecutive sentences under I.C.R. 35.

King v. State, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Where an application for post-conviction relief sought to have a sentence for a burglary run concurrently with the sentence for a rape committed while on probation for the burglary, and repeatedly referred to both crimes and sentences, both convictions were before the court for review, although the application purported to concern the burglary charge alone. King v. State, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Faced with a motion for change of plea in a criminal case over which the district court had lost jurisdiction after judgment and sentence were pronounced, the district court correctly treated the motion as an application for post-conviction relief. Gomez v. State, 120 Idaho 632, 818 P.2d 336 (Ct. App. 1991).

Because proceedings under the Post-Conviction Procedure Act are civil in nature, where there is competent and substantial evidence to support a decision made after an evidentiary hearing on an application for post-conviction relief, that decision will not be disturbed on appeal. Odom v. State, 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992).

Defendant's assertion that the district court erred when it failed to adequately specify the reasons underlying its sentencing determinations was without merit for three reasons: first, sentencing courts need not state their reasons for the imposition of particular sentences; second, the district court is not required to state on the record why the sentences were "necessary"; and third, the district court did state its rationale for the sentencing determinations. State v. Gomez, 127 Idaho 327, 900 P.2d 803 (Ct. App. 1995).

Letter to a trial court from a defendant can be treated as some type of motion or application for post-conviction relief. However, where an inmate seeking post-conviction relief sent a letter to the court indicating that he had been unable to contact his attorney, the court did not make such a finding and merely assigned his case to a new public defender. Sayas v. State, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 129 (Ct. App. Dec. 3, 2003).

Burden of Proof.

In a post-conviction proceeding brought under this section, the burden is on the applicant to establish his grounds for relief by a preponderance of the evidence. Odom v. State, 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992).

An application for post-conviction relief bears the burden of proving, by a preponderance of the evidence, the allegations on which the application is based. Nguyen v. State, 126 Idaho 494, 887 P.2d 39 (1994).

The applicant in a post-conviction case has the burden of proving, by a preponderance of the evidence, the allegations which the appli-

cant contends entitle him to relief. Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

Capital Cases.

Section 19-2719 of the Idaho Code does not eliminate the applicability of the Uniform Post-Conviction Procedure Act (UPCPA) to capital cases, but it supersedes the UPCPA to the extent that their provisions conflict. McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

Cruel and Unusual Punishment.

To the extent that an Eighth Amendment "cruel and unusual punishment" issue is raised, post-conviction proceedings are appropriate. Whitehawk v. State, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

Direct Appeal.

A challenge to inadvertent prior conviction testimony and the allegation of failure to disclose witnesses prior to trial could have been raised on a direct appeal and thus the court refused to consider them in an application for post-conviction relief. Hoffman v. State, 125 Idaho 188, 868 P.2d 516 (Ct. App. 1994).

Dismissal of Application.

The dismissal of an application for post-conviction relief, based upon failure to state claims that fell within the provision of the post-conviction procedure act, was proper. King v. State, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

The district court properly granted state's motion to dismiss where defendant had not shown any reason or excuse for his failure to raise double jeopardy and due process issues on direct appeal, nor had defendant raised a substantial doubt about the reliability of the guilt finding pursuant to this section. Hedger v. State, 124 Idaho 49, 855 P.2d 886 (Ct. App. 1993).

Where petitioner, who had access to the psychological report, identified no deficiency or inaccuracy therein, or stated how he would have rebutted any information in the report if it had been disclosed to him before a hearing was conducted, court affirmed the denial of post-conviction relief predicated on the non-disclosure of the psychological report. January v. State, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995).

—Held Erroneous.

A defendant's allegations that improper or inadequate medical treatment was afforded for his debilitated mental and physical condition while incarcerated constituted genuine issues of fact which required an evidentiary hearing; therefore, dismissal of his petition for post-conviction relief was error.

Whitehawk v. State, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

The trial court erred in taking judicial notice of the trial proceedings and in turn erred in dismissing defendant's petition without conducting an evidentiary hearing on the ineffective assistance of counsel claims. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Due Process.

The district court did not err in denying defendant's motion to interject the issue of his court-appointed attorney's lack of diligence with respect to an initial motion for post-conviction relief where such issue was raised in a subsequent application for such relief, and defendant's due process rights were not violated by this denial. *Gee v. State*, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990).

A post-conviction applicant bears the burden not only to prove a constitutional violation, but also to demonstrate that he suffered some result in prejudice that would entitle him to relief; to demonstrate prejudice from being denied access to the psychological evaluation, the applicant must indicate what he would or could have done to rebut the report. *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997).

Evidence of Material Fact Not Previously Presented.

Where it was not shown that a presentence psychological report was based on erroneous information or otherwise deficient when prepared, post-conviction relief was not authorized by subdivision (a)(4) of this section to vacate a lawful sentence upon a showing that, in the sixteen months of incarceration following sentencing, there had been a marked improvement in defendant's mental health as compared to his mental condition described in a psychological report relied upon by the court at sentencing. *Bure v. State*, 126 Idaho 253, 880 P.2d 1241 (Ct. App. 1994).

Evidentiary Hearing.

Allegations of error, unaccompanied by a showing of prejudice, do not entitle an applicant to an evidentiary hearing regarding post-conviction relief. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995).

Where the defendant provided neither reason nor excuse as to why he did not raise a claim of innocence in his application for post-conviction relief, the mere assertion that the issue had not been adequately addressed or adjudicated in state court proceedings was insufficient, the defendant's claim was procedurally barred, and the magistrate did not err in failing to afford the defendant an evidentiary hearing. *Hays v. State*, 132 Idaho 516, 975 P.2d 1181 (Ct. App. 1999).

Excessive punishment.

Imposition of unified sentences for drug related felonies of 15 years with five years determinate on four convictions were not unduly severe and excessive where facts showed that defendant was heavily involved in drug trafficking, that he had previously been convicted in another state for two counts of selling heroin, had received a sentence of four years of which he served 18 months and that such prior incarceration had not deterred him from resuming a role in the drug trade. *State v. Gomez*, 127 Idaho 327, 900 P.2d 803 (Ct. App. 1995).

Failure to Raise Issues.

Under the pre-1986 version of this section, defendant waived all of his claims except his constitutional claims and the claims of ineffective assistance of counsel at trial and on appeal. The failure to raise known and existing grounds of unconstitutional action on direct appeal barred a subsequent challenge of the conviction predicated on those grounds which, though known, had not been utilized. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Grounds for Relief.

Defendant's inducement to enter a plea of guilty on assurance by his court-appointed counsel that he would receive probation or confinement in jail and not a prison sentence, in the absence of a showing that such assurance was based upon commitments by responsible officers of the state did not constitute inadequate representation and was not ground for post-conviction relief. *Walker v. State*, 92 Idaho 517, 446 P.2d 886 (1968).

That a defendant sentenced on a plea of guilty was arrested without a warrant on the uncorroborated statement of an accomplice was not ground for post-conviction relief. *Walker v. State*, 92 Idaho 517, 446 P.2d 886 (1968).

Holding a defendant in jail for 17 days without permitting him to make a telephone call was not ground for post-conviction relief where he was assigned counsel six days after his arrest and represented by such counsel at all stages of the proceedings. *Walker v. State*, 92 Idaho 517, 446 P.2d 886 (1968).

The coercion of defendant into signing a statement was not ground for post-conviction relief after his conviction and sentence on a plea of guilty. *Walker v. State*, 92 Idaho 517, 446 P.2d 886 (1968).

The type of representation of counsel afforded defendant in prior proceedings, is quite relevant to the question of whether a guilty plea was made voluntarily and understandingly, and should be considered in petition for post-conviction relief. *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969).

Where evidence clearly disclosed that the

appellant had rendered his plea of guilty, understandingly and knowingly, court's dismissal of his petition for post-conviction relief was proper. *Lipps v. State*, 94 Idaho 185, 484 P.2d 734 (1971).

The alleged trial errors, that the court improperly admitted evidence of a juvenile crime, refused to instruct the jury on petitioner's defense of implied power of attorney, and refused to grant a continuance because indigent defendant could not reimburse the state for expense of having jury serve an extra day, did not amount to fundamental error to entitle petitioner to post-conviction relief based on these alleged errors. *Smith v. State*, 94 Idaho 469, 491 P.2d 733 (1971).

Where it was not shown from the record in habeas corpus proceeding that petitioner was being held in state prison pursuant to a judgment of conviction or other process issued from a court, thus establishing jurisdiction under the Uniform Post-Conviction Procedure Act, petition for writ of habeas corpus was improperly denied. *Kinner v. State*, 95 Idaho 129, 504 P.2d 402 (1972).

A transfer of a prisoner to the custody of another state for prosecution under allegedly fraudulent detainer documents in violation of the Interstate Agreement on Detainers is not a ground for post-conviction relief under subsection (a) of this section. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

Where subsection (b) of this section was amended to provide that an issue is "forfeited" if not raised on direct appeal after the defendant's direct appeal was decided, and the issue was not raised below during the post-conviction proceedings, the Court of Appeals could review the defendant's claim for post-conviction relief. *Matthews v. State*, 113 Idaho 83, 741 P.2d 370 (Ct. App. 1987).

Any person convicted of, or sentenced for, a misdemeanor may seek post-conviction relief if he or she meets the requirements outlined in this section. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Claim that robbery sentence was harsh, albeit lawful, afforded no basis for post-conviction relief. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987).

On application for post-conviction relief, allegations as to the involuntariness of the defendant's guilty plea fell short of establishing a genuine issue. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987).

A failure by the Board of Correction to provide psychological treatment for convicted pedophiles or other sexual offenders would not render either the conviction or the sentence, as pronounced, unlawful. If treatment is legally required, as the United States District Court for this state has held, and if the treatment is nonexistent or is inadequate,

then the proper remedy is to mandate reasonably adequate treatment. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), aff'd, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

The lack of psychological treatment available to the defendant convicted of lewd and lascivious conduct created an issue cognizable in post-conviction relief proceedings. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), aff'd, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Since the purpose in sentencing is punitive and not rehabilitative, § 20-223 does not require the establishment of a special psychological treatment program for sex offenders. *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

The issue on appeal from the dismissal of an application for post-conviction relief is whether the application alleges facts which if true would entitle the applicant to relief. *Whitehawk v. State*, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

Changes in the defendant's character which occur after a valid conviction is entered and a legal sentence has been imposed are not within the scope of this section. *Brandt v. State*, 110 Idaho 341, 796 P.2d 1023 (1990).

In a motion for a new trial based on recanted testimony, if the testimony at trial was false; without that false testimony the jury might have reached a different conclusion as to defendant's conviction; and the defendant was unable to meet the false testimony or did not know of its falsity until after the trial, the defendant is entitled to a new trial. *Bean v. State*, 119 Idaho 632, 809 P.2d 493 (1991).

It would be contrary to the legislative intent of § 19-4902, to set a definite time limit upon challenges to convictions and sentences, to allow the limitation period to be extended by the filing of a Rule 35 motion, when the denial of a Rule 35 motion is not itself reviewable under the Uniform Post-conviction Procedure Act. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).

A guilty plea may be constitutionally accepted without the court informing a defendant of parole eligibility requirements; however, defendant's claim that he had not been informed as to any mandatory minimum sentence he must serve, constituted an allegation that entitled him to relief. *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

Because defendant's sentence did not exceed the statutory maximum of life imprisonment, and no contention was made that the sentence was otherwise illegal, the court refused to consider the issue of whether sen-

tence of 10 years minimum confinement and \$10,000 fine was unduly harsh for conviction of delivery of a controlled substance, heroin. *Ruiz v. State*, 122 Idaho 222, 832 P.2d 1157 (Ct. App. 1992).

The Uniform Post-Conviction Procedure Act, §§ 19-4901 — 19-4911, provides a mechanism by which a person convicted of a crime may show that his conviction was in violation of the Constitution, that the conviction should be vacated in the interest of justice, or that the conviction is otherwise subject to collateral attack. As such, the act provides an appropriate mechanism for considering claims of ineffective assistance of counsel and claims that a plea of guilty was accepted in violation of the requirements set forth in I.C.R. 11. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

The grounds for relief asserted in the post-conviction application were, in essence, the same as the grounds raised in the defendant's unsuccessful motion for a new trial. Once the motion for new trial was denied and judgment was entered, the defendant had 42 days in which to file an appeal. That appeal was never pursued. Under this section, defendant was precluded from raising the same issues a second time by way of a post-conviction proceeding even though the defendant attempted to place the blame upon his court-appointed counsel for not appealing from the judgment of conviction. *Henderson v. State*, 123 Idaho 138, 844 P.2d 1388 (Ct. App. 1992).

Defendant's allegations, that he was under the influence of medication which inhibited his ability to properly enter a guilty plea, framed a material issue of fact, namely, whether the medication affected his ability to enter a knowing, intelligent and voluntary plea; therefore, the district court erred in deciding that defendant's guilty pleas were knowingly and voluntarily entered without affording defendant an evidentiary hearing. *West v. State*, 123 Idaho 250, 846 P.2d 252 (Ct. App. 1993).

Where codefendant recanted his testimony about defendant's role in a first-degree murder, defendant's sentence was vacated in the interest of justice and a new sentencing proceeding was directed. *Bean v. State*, 124 Idaho 187, 858 P.2d 327 (Ct. App. 1993).

Where the question of whether any additional psychological evaluations should have been obtained before the district court imposed sentence was raised as an issue on defendant's direct appeal from the judgment of conviction, the district court was not required to consider the issue anew in the post-conviction action. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

In order to be granted post-conviction relief, an applicant must show that the asserted basis for relief raises a substantial doubt

about the reliability of the finding of guilt or the finding that defendant is not a suitable candidate for probation. *Sosa v. State*, 127 Idaho 766, 906 P.2d 136 (Ct. App. 1995).

Where court lacked jurisdiction to remove the defendant from the custody of the Department of Corrections and grant him probation and the order granting defendant probation was not made by a prompt ruling on a timely and properly filed Rule 35 motion, but on an application for post-conviction relief filed more than ten months after the defendant was committed to the custody of the Department of Corrections, since defendant's post-conviction application could not be used to obtain a reduction of a legal sentence, and it failed to state a claim entitling him to relief. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

Guilty Plea.

Where defendant when asked by the district court before acceptance of his guilty plea if any promises had been made to him outside of the agreement signed by him or if he had been forced in any way to plead guilty and where he replied "no," his assertion that promises of leniency were made for he and his wife other than those specified in the agreement and that he and his wife had received threats from "associates in the drug community" and thus his guilty plea was not freely and voluntarily made but was induced by coercion failed. *Huck v. State*, 124 Idaho 155, 857 P.2d 634 (1993).

Habeas Corpus.

Uniform Post-Conviction Procedure Act (§§ 19-4901 — 19-4911) should be construed as an expansion of the writ of habeas corpus and not as a denial of same. *Dionne v. State*, 93 Idaho 235, 459 P.2d 1017 (1969).

Since the post-conviction remedy operates as an extension of the defendant's constitutional right to habeas corpus, substance and not form governs the proceedings, and where petitioner filed in the wrong district court a petition the grounds in which, if true, would have entitled him to relief, he was granted leave to refile the petition in the proper district, where the conviction occurred, although a previous petition for post-conviction relief had been dismissed in that district court on procedural grounds. *Still v. State*, 95 Idaho 766, 519 P.2d 435 (1974).

Where the defendant claimed that the voluntariness of his plea was undermined by the conditions of his detention, he could seek relief under the Uniform Post-Conviction Procedure Act even though the habeas corpus remedy he sought was moot. *Russell v. Fortney*, 111 Idaho 181, 722 P.2d 490 (Ct. App. 1986).

Because the post-conviction procedure act is construed as an expansion of the writ of

habeas corpus, and substance governs over form, a properly raised issue may be considered by the district court without requiring a separate writ to be filed. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Based on the precedents which determine that, for the purpose of challenging the validity of a conviction, the writ of habeas corpus has been replaced by post-conviction relief proceedings under this section, petitioner cannot turn to the writ of habeas corpus in his attempt in a capital case to challenge the validity of his conviction. His remedies are limited by the statutory procedures set out in § 19-2719. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

Since the timing of the filing of the actions is not controlling, but rather, the timing of the adjudication which gives rise to the doctrine of *res judicata*, fact that application for post-conviction relief was filed before the petition for a writ of habeas corpus was of no consequence and decision in the habeas corpus action barred the post-conviction relief application because the habeas corpus action was not a "prior" action between the parties. *Gilbert v. State*, 119 Idaho 684, 809 P.2d 1163 (Ct. App. 1991).

Defendant's contention that his motion for change of plea should have been treated by the district court as a petition for writ of habeas corpus as to which no limitation period applies lacks merit because this section provides that the Idaho Post-Conviction Relief Act is the exclusive means for challenging the validity of a conviction or sentence. *Gomez v. State*, 120 Idaho 632, 818 P.2d 336 (Ct. App. 1991).

The Uniform Post Conviction Procedure Act is an expansion of the writ of habeas corpus. *Aeschliman v. State*, 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999).

Illegal Sentences.

Illegal sentences are appropriately addressed in post-conviction proceedings. *Evans v. State*, 127 Idaho 662, 904 P.2d 574 (Ct. App. 1995).

In the Interest of Justice.

The phrase "in the interest of justice" in subdivision (a)(4) of this section does not provide a separate ground for relief where the claim is predicated upon newly discovered evidence. Instead, the request for a new trial in a post-conviction proceeding based on newly discovered evidence is the same as a motion for new trial subsequent to a jury verdict. *Whiteley v. State*, 131 Idaho 323, 955 P.2d 1102 (1998).

Ineffective Assistance of Counsel.

It is conceivable that a defendant may have a direct appeal pending on purported errors

that arose during the trial, as shown by the record, and at the same time pursue the question of whether he was denied effective assistance of counsel in a post-conviction hearing as to matters arising outside of the record. *Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979).

Where a petitioner had raised the issue of competence of counsel on direct appeal, the petitioner could not again have the same matter considered further by the Supreme Court on appeal from the denial of a post-conviction application. *Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979).

Where a defendant claims that he was denied the effective assistance of counsel, it is not sufficient by itself to show that he has been denied reasonably competent assistance of counsel; in addition, it must be shown that the conduct of counsel contributed to the conviction. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

A claim of ineffective assistance of counsel, in representing a petitioner in an initial application for post-conviction relief may not be raised as an issue in a subsequent or successive application for such relief. *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987).

The decision whether and how to conduct cross-examination is a strategic decision within the province of the attorney; upon review, this decision should not be second-guessed unless it is made upon the basis of inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective evaluation. *Cunningham v. State*, 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990).

A defendant may raise an issue of ineffective assistance of counsel in a petition for post conviction relief where that issue was raised in an earlier appeal, but the appeal was voluntarily withdrawn by the defendant prior to decision. *Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990).

Although a defendant alleging ineffective assistance of counsel at trial may raise the issue on direct appeal or reserve it for post conviction proceedings, he may not do both; if the issue is raised and considered on appeal, it becomes *res judicata*. *Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990).

In advancing a post-conviction relief claim, the applicant bears a heavy burden in proving that his attorney's performance was deficient; because of the distorting effects of hindsight in reconstructing the circumstances of counsel's challenged conduct, there is a strong presumption that counsel's performance was within the wide range of reasonable professional assistance — that is, "sound trial strategy." *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990).

Although a defense attorney admitted that he did not file a request for discovery of

materials and information pertinent to the charges against defendant, he did avail himself of the prosecutor's "open file" policy by reviewing all documents contained in the file, and he retained the documents which he felt were important, and while it may have been advantageous for the attorney to file a discovery request, it did not appear from the record that he would have uncovered any additional or different information than what he obtained from his review of the prosecutor's file. *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990).

Defense attorney's failure to file a suppression motion did not constitute deficient performance. *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990).

A claim of ineffective assistance of counsel, based upon counsel's alleged failure to file an Idaho Criminal Rule 35 motion, properly may be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992).

There is simply no ground for post-conviction relief that provides for a challenge to the effectiveness of counsel in the appeal stage from the first petition for post-conviction relief. *Lee v. State*, 122 Idaho 196, 832 P.2d 1131 (1992).

A criminal defendant may raise a claim of ineffective assistance of counsel either on direct appeal or reserve the issue for post-conviction proceedings. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Contention of defendant that his guilty plea resulted from ineffective assistance of his former counsel where such counsel advised him to plead guilty without pursuing a motion to suppress evidence found by police under an allegedly defective search warrant and to press for suppression of evidence allegedly found in vehicle that police were not authorized to search failed, since evidence showed that such motion, if pursued, would not have been granted. *Huck v. State*, 124 Idaho 155, 857 P.2d 634 (1993).

In order to prevail on a claim of ineffective assistance of counsel an applicant must meet a two-pronged test: he must show that counsel's performance was deficient and that the deficiency prejudiced the applicant. Where the alleged deficiency is counsel's failure to file a suppression motion, conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the test. If the motion lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner would not have been prejudiced for want of its pursuit. *Huck v. State*, 124 Idaho 155, 857 P.2d 634 (1993).

Where defendant's application for post-conviction relief raised a genuine issue of mate-

rial fact as to whether he communicated his intent to appeal to his counsel, defendant was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel. *Ricca v. State*, 124 Idaho 894, 865 P.2d 985 (Ct. App. 1993).

Where an applicant for post-conviction relief has been afforded a full evidentiary hearing on a claim of ineffective assistance, which is later reviewed on a direct appeal, resurrecting the ineffective assistance claim is barred by application of *res judicata*. *Hoffman v. State*, 125 Idaho 188, 868 P.2d 516 (Ct. App. 1994).

There was substantial and competent evidence to support the district court's denial of defendant's application for post-conviction relief where defendant did not properly establish that his counsel's decision not to call mitigation witnesses, or his claim that counsel failed to adequately review the presentence report, was deficient conduct. *Howard v. State*, 126 Idaho 227, 880 P.2d 261 (Ct. App. 1994).

The ineffectiveness of counsel, in an initial application for post-conviction relief, is not among the permissible grounds for filing another post-conviction relief application under this section. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

In second application for post-conviction relief, defendant asserted that his counsel's conduct in not petitioning the Supreme Court for review of the Court of Appeals' opinion was ineffective assistance; defendant claimed that he was prejudiced by his counsel's failure to file a petition for the review from the Court of Appeals' opinion affirming the denial of his initial post-conviction application in that the prejudice he suffered was loss of opportunity to have his federal habeas corpus petition considered on its merits, rather than dismissed for failure to exhaust state remedies. Defendant's claim was not an appropriate ground for relief under subsection (a), for the post-conviction relief act is designed to deal with challenges to allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

Where defendant was attacking his counsel's performance on the direct appeal of his convictions and sentences, not his counsel's performance in a post-conviction proceeding, he could bring his claim for relief for ineffective assistance of counsel under the Uniform Post-Conviction Procedure Act, (§ 19-4901 et seq.). *Hernandez v. State*, 127 Idaho 685, 905 P.2d 86 (1995).

Where defendant vaguely asserted that he raised genuine factual issues regarding counsel's performance at trial yet did not identify any and where defendant had not pointed to a

single deficiency in trial counsel's performance and did not mention or support allegations that evidence of an out-of-state conviction and confession were inadmissible, district court's summary dismissal of defendant's application for post-conviction relief was affirmed. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

An appellate attorney's refusal to assert trial counsel's ineffectiveness as an issue on direct appeal is generally not ineffective assistance by the appellate attorney. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

Because for defendant to testify about his knowledge of the operability of the guns used in the commission of the crimes charged would have contradicted his plea of not guilty and his claim of innocence, counsel's failure to put defendant on the stand solely to testify that one of the two guns used in the commission of the crimes was inoperable could not be held to be ineffective. *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996).

Because notice provided by count III of the information charged in 1982 burglary met the pre-1983 pleading standards of § 19-2520 and satisfied due process concerns, counsel could not be found ineffective for not requesting more specifics about the enhancement allegation in the information. *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996).

Where claim of defendant convicted of possession of controlled substance with intent to deliver of ineffective assistance of counsel, in that his counsel should have objected to the minimum fixed term of five years imposed by the district court upon its finding that offense was committed with 100 feet of a school in violation of his rights and under § 37-2739B, which he argued was unconstitutional, had already been decided adversely on a I.C.R. 35 motion, the same allegations on appeal failed to frame a genuine issue of material fact and summary dismissal of his post-conviction application as authorized by § 19-4906(b) was proper. *State v. Ayala*, 129 Idaho 911, 935 P.2d 174 (Ct. App. 1996).

Defendant's assertion that his counsel failed to provide him with effective assistance of counsel by not raising on direct appeal the issue of whether hands could be a deadly weapon under § 18-905(a), failed since his direct appeal became final prior to precedent of *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993), where the court recognized that while the determination of whether an instrumentality constituted a deadly weapon was a fact-sensitive determination but held for first time, that the instrumentality must be apart from the human body. *Butler v. State*, 129 Idaho 899, 935 P.2d 162 (1997).

In application for post-conviction relief based on ineffective assistance of counsel, in

order to establish a violation of the constitutional guarantee of effective assistance of counsel the defendant must show both deficient performance and resulting prejudice; to show deficient performance the applicant has the burden of proving that the attorney's conduct fell below an objective standard of reasonableness and, to demonstrate prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

In prosecution for lewd conduct with a minor and child abuse where in application for post-conviction relief defendant moved for summary judgment on the issue of whether defendant received ineffective assistance of counsel when his counsel failed to object to the testimony of a therapist who had counseled one of the victims, where court assumed that therapist's testimony was objectionable and counsel was deficient in not objecting to it, but defendant did not show how he was prejudiced by the testimony, the district court did not err in denying defendant's motion for summary judgment. *Matthews v. State*, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

Dismissal of direct appeal, whether voluntary or not, forestalled consideration of the ineffective assistance of counsel claims by an appellate court. Therefore, order denying motion for new trial and the abandoned direct appeal should not be viewed as a bar to post-conviction action. *Milburn v. State*, 130 Idaho 649, 946 P.2d 71 (Ct. App. 1997).

Ineffective assistance of counsel is not among the grounds for a new trial delineated in section 19-2406. The appropriate means to present an ineffective assistance claim is an application for post-conviction relief. Therefore, state's argument that the ineffective assistance of counsel claim could have been raised on direct appeal was erroneous. *Milburn v. State*, 130 Idaho 649, 946 P.2d 71 (Ct. App. 1997).

The Uniform Post-Conviction Procedure Act is an appropriate vehicle for considering claims of ineffective assistance of counsel. *Hernandez v. State*, 132 Idaho 352, 972 P.2d 730 (Ct. App. 1998).

Material Facts Not Previously Heard.

Although defendant presented two affidavits, which stated that he was incapacitated by intoxication at the time of robbery, that one witness testified for the state so that he would not receive a prison sentence, and that the other witness withheld exculpatory information upon the promise of leniency, these broad allegations did not prove by a preponderance of the evidence that state officials requested the two witnesses to deliver false testimony or

that state officials were aware that the testimony was false. Therefore, defendant failed to present evidence of material facts, not previously presented and heard under subdivision (a)(4) of this section. *Pierce v. State*, 109 Idaho 1018, 712 P.2d 719 (Ct. App. 1985).

Subdivision (a)(4) of this section barred further adjudication on the issue of the pre-trial identification of the defendant, upon the facts presented in the record of the earlier litigation, because the petition for post-conviction relief did not present the question in a materially different factual context. *Baruth v. Gardner*, 110 Idaho 156, 715 P.2d 369 (Ct. App. 1986).

Where the defendant failed to offer any new, affirmative evidence of his own to indicate another state as the place of killing, he failed to demonstrate the existence of material facts, not previously presented and heard. *Gibson v. State*, 110 Idaho 631, 718 P.2d 283 (1986).

The factors included in I.C. 19-2523 do not, by themselves, present new information such as would bring them within subdivision (a)(4) of this section, but rather provide a manner in which to evaluate information that the court already has before it. *Hollon v. State*, 132 Idaho 573, 976 P.2d 927 (1999).

Nature of Proceeding.

An application for post-conviction relief is a special proceeding, civil in nature. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969).

Admission of evidence of appellant's prior criminal record in post-conviction proceeding was not an error since the evidence was not submitted for impeachment purposes. *Lipps v. State*, 94 Idaho 185, 484 P.2d 734 (1971).

An action under the Uniform Post Conviction Procedure Act is civil in nature. Thus, the Idaho Rules of Civil Procedure are applicable in such a proceeding. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

An application for post-conviction relief is a special proceeding, civil in nature and is an entirely new proceeding, distinct from the criminal action which led to conviction. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), modified on other grounds, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

Post-conviction relief is not a proper avenue for challenging a judge's exercise of discretion, as opposed to his lawful authority, in sentencing. *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987).

An application for post-conviction relief is a special proceeding, civil in nature and is an entirely new proceeding distinct from the criminal action which led to conviction. The Rules of Civil Procedure are applicable in such a proceeding. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

A petition for post-conviction relief is a special proceeding that is civil in nature; it is a proceeding entirely new and independent from the criminal action which led to conviction. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

A trial court may grant a motion by either party for summary disposition of an application for post-conviction relief where it appears from the pleadings that no genuine issue of fact exists. However, where issues of material fact exist, an evidentiary hearing must be held. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

In ruling on an appeal from a summary disposition of a petition for post-conviction relief, the Court of Appeals will determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions on file, together with any affidavits on file; moreover, the court will liberally construe the facts in favor of the moving party, together with all reasonable inferences to be drawn from the evidence. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

Post-conviction relief proceedings are not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

An application for post-conviction relief is a special proceeding, civil in nature and is an entirely new proceeding, distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

Proceedings in capital cases under Post Conviction Procedure Act remain civil in nature and are therefore governed by the Rules of Civil Procedure. *Pizzuto v. State*, 127 Idaho 58, 903 P.2d 58 (1995).

An application for post-conviction relief under this section is a special proceeding, civil in nature, and is an entirely new proceeding, distinct from the criminal action which led to the conviction. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995).

An application for post-conviction relief under this section is a special proceeding, distinct from the criminal action which led to the conviction, and if the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each such issue. *Sanchez v. State*, 127 Idaho 709, 905 P.2d 642 (Ct. App. 1995).

Because defendant's petition challenged the validity of his conviction, it presented an issue of post-conviction relief that should have been brought pursuant to the UCPA and not as a habeas corpus petition and because an application for post-conviction relief must be filed in the district court where the conviction occurred and it was not, dis-

missal was affirmed. *Abbott v. State*, 129 Idaho 381, 924 P.2d 1225 (Ct. App. 1996).

Application for relief under this act is civil in nature and is governed by the Idaho Rules of Civil Procedure. *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998).

Newly Discovered Evidence.

A motion for a new trial based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *Cunningham v. State*, 117 Idaho 428, 788 P.2d 243 (Ct. App. 1990); *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976).

New testimony was insufficient to refute the other evidence of defendant's guilt and could not meet the standard in *State v. Drapeau*, 97 Idaho 685, 551 P.2d 972 (1976), which requires that the new information or evidence "will probably produce an acquittal". *Grube v. State*, 134 Idaho 24, 995 P.2d 794 (2000).

Notice.

District court's order of dismissal had to be vacated because the State's motion identified no grounds for dismissal of defendant's various claims, including post-conviction relief under this section, and was therefore ineffective as presenting notice of deficiencies in defendant's application, and since the district court's subsequent order acted as a *sua sponte* dismissal on grounds advanced by the court, it required notice from the court to comply with the twenty day notice requirement under § 19-4906(b) before dismissing defendant's post-conviction action. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Defendant's claim that he was given improper notice of the jurisdictional review committee's initial meeting which reached the preliminary determination not to recommend probation and claims that he was not allowed to participate in that meeting and that the information the committee relied on was not provided to him until after the initial determination had been made did not entitle him to relief, and the post-conviction application was properly dismissed without an evidentiary hearing on the issue. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995).

In application for post-conviction relief where applicant claimed that the due process standards were violated when he was denied access to a complete copy of his psychological evaluation where applicant stated that he had received neither notice that Jurisdic-

tional Review Committee did not intend to recommend probation nor a summary of his psychological evaluation report, court in viewing the testimony of a member of the commission that defendant had received both as more credible and reliable than applicant's testimony and finding that there was substantial evidence that applicant had received a summary of his evaluation was not an abuse of discretion. *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997).

Other Relief.

Other types of challenges to an inmate's incarceration, which are not enumerated in this section, including challenges to the conditions of confinement, may continue to be asserted in a petition for writ of habeas corpus pursuant to Sections 19-4201 through 19-4236. *Eubank v. State*, 130 Idaho 861, 949 P.2d 1068 (Ct. App. 1997).

Remedies for post conviction relief, such as an order for a new trial in a criminal case, or an order that the applicant be allowed to withdraw a guilty plea, are carried out by reopening the criminal case and conducting further proceedings in that case. *State v. Law*, 131 Idaho 90, 952 P.2d 905 (Ct. App. 1997).

Prejudice.

Even though under *Browning v. Vernon*, 874 F. Supp. 1112 (D.Idaho 1994) an inmate is entitled to a copy of the psychological evaluation that is reviewed by the Jurisdictional Review Committee, the inmate must nevertheless show prejudice to be entitled of post conviction relief under § 19-4901. *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997).

Psychological Report.

In application for post-conviction relief although applicant is entitled to a copy of his entire psychological report, the wording of the report would be grounds for relief only if applicant demonstrated prejudice, that there was some more he could and would have done to rebut the report; thus where applicant failed to show that if he had seen the entire report he could have or would have presented any additional evidence that differed in substance from the evidence he did present to the jurisdictional review committee he was not entitled to relief on his post-conviction claim concerning the evaluation. *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997).

In application for post-conviction relief where there was substantial evidence showing that applicant had received a copy of the summary of his psychological evaluation, as a matter of due process applicant was entitled to receive a copy of the entire report not just a summary because if he did not it would result in the use by the committee of information of which applicant was not made aware of or

afforded an opportunity to rebut. *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997).

Purpose of Act.

Proper use of this act (§§ 19-4901 — 19-4911) avoids repetitious and successive applications, eliminates confusion and yet protects the applicant's constitutional rights. *Dionne v. State*, 93 Idaho 235, 459 P.2d 1017 (1969).

The Uniform Post-Conviction Procedure Act governs the procedure and manner in which a petition for post-conviction relief may be sought. The proper use of this Act is to avoid repetitious and successive applications, while protecting the applicant's constitutional rights. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Retroactive Application.

Notwithstanding that direct appeal was fully conducted and final in 1985, the District Court relied upon the 1986 amendment to § 19-4901 in ruling that defendant had waived most of the issues raised in his petition. This was error. Section 73-101 clearly prohibits the retroactive application of newly passed legislation. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Right to Counsel.

The remedy of one claiming invalidity of his conviction because of failure of the court to inform him of his right to counsel at the time his plea of guilty was entered was the procedure provided in this act and not by escape. *State v. Handran*, 92 Idaho 579, 448 P.2d 193 (1968).

Where the facts alleged by petitioner in the petition did not support his allegation that he was ineffectively represented by counsel, he was not entitled to the relief on the alleged ground. *Smith v. State*, 94 Idaho 469, 491 P.2d 733 (1971).

Scope of Relief.

The Uniform Post-Conviction Procedure Act does not require the trial court to consider again issues previously heard and decided by the Supreme Court. *Larsen v. May*, 93 Idaho 602, 468 P.2d 866 (1970).

Matters outside the record cannot be considered on appeal but must be raised by application under this section. *State v. Congdon*, 96 Idaho 377, 529 P.2d 773 (1974).

Where defendant, who had been convicted of forcible rape based upon his plea of guilty, sought to withdraw his plea of guilty after sentencing because the conviction was based on an allegedly illegal search and seizure, but where the facts of the search and seizure were not in the record, defendant's remedy was not by appeal but rather through post-conviction proceedings. *State v. Lawrence*, 97 Idaho 775, 554 P.2d 953 (1976).

The proper forum for raising allegations based on matters outside the record is post conviction proceedings. *State v. Blackburn*, 99 Idaho 222, 579 P.2d 1205 (1978).

Generally, post-conviction relief cannot be used to correct mere errors or irregularities in the proceedings of a trial court which are not jurisdictional and which, at the most, render a judgment merely voidable; it is, however, available to cure fundamental errors occurring at the trial which affect either the jurisdiction of the court or the validity of the judgment, even though these errors could have been raised on appeal. *Maxfield v. State*, 108 Idaho 493, 700 P.2d 115 (Ct. App. 1985).

The failure to suppress evidence allegedly illegally seized is not fundamental error which may be cured in a post-conviction relief proceeding; an allegedly illegal arrest is likewise not fundamental error. *Maxfield v. State*, 108 Idaho 493, 700 P.2d 115 (Ct. App. 1985).

A post-conviction relief proceeding under this section is designed to permit a challenge to an underlying conviction or to an illegal sentence; it is not intended as a means of pursuing a collateral attack upon the manner in which the trial court exercised its sentencing discretion; any issue which could have been, but was not, raised on direct appeal — such as a challenge to the reasonableness of the length of a sentence — is forfeited and may not be considered in a post-conviction proceeding; it is clear in this case that the form of relief sought by defendant in his original application simply was not available under the provisions of the post-conviction relief act. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992).

An application for post-conviction relief is not a substitute for proceedings in the trial court, or for an appeal from the sentence or conviction. *Heartfelt v. State*, 125 Idaho 424, 871 P.2d 841 (Ct. App. 1994).

Where defendant's post-conviction petition before the district court where he alleged that the court lacked jurisdiction since the information under which he was convicted failed to state a felony offense as it charged that he committed aggravated assault with a deadly weapon by using his hands to choke the victim and hands were not deadly weapons because *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993) held that hands and other body parts or appendages may not by themselves be considered deadly weapons under aggravated assault and aggravated battery statutes, since defendant's appeal from the district court's decision was final at the time *Townsend* was decided, it did not apply to defendant's case. *Butler v. State*, 129 Idaho 899, 935 P.2d 162 (1997).

Supreme Court's assignment order, appointing judge to preside over post-conviction relief action, did not empower the judge to

participate in the underlying criminal case. *State v. Law*, 131 Idaho 90, 952 P.2d 905 (Ct. App. 1997).

Sentencing judge in criminal actions, rather than judge appointed to hear consolidated post-conviction actions, was the judge with authority to determine whether to relinquish jurisdiction over defendants following their second evaluation for probation at state correctional facility. *State v. Law*, 131 Idaho 90, 952 P.2d 905 (Ct. App. 1997).

Timeliness.

Inmate, whose habeas corpus petition alleged his guilty plea was not voluntary and therefore his conviction and sentence were invalid, was denied relief where he filed his petition six and one-half years after his judgment of conviction; the remedy for such a challenge is the Uniform Post-Conviction Procedures Act in the county where convicted. *Morris v. State*, 123 Idaho 549, 850 P.2d 198 (Ct. App. 1993).

All claims made in defendant's successive petition for post-conviction relief were barred for failure to bring them within a reasonable time after they were discovered, where defendant did not show a justifiable reason for the six-month delay in filing. *Rhoades v. State*, 135 Idaho 299, 17 P.3d 243 (2000).

Transcripts.

Although a defendant could not obtain a transcript of her sentencing hearing, at public expense, in anticipation of filing for post-conviction relief, she was at liberty to file an application for such relief and would be able to obtain a transcript then if one was needed. *State v. McRoberts*, 114 Idaho 459, 757 P.2d 722 (Ct. App. 1988).

This state's statutory scheme for post-conviction relief does not mandate production of transcripts prior to an application being filed. *State v. McRoberts*, 114 Idaho 459, 757 P.2d 722 (Ct. App. 1988).

Prior to dismissing a petition for post-conviction relief, the District Court is required to obtain that portion of the trial transcript as is necessary to a determination that there are no material issues of fact and that the petitioner is not entitled to post-conviction relief. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

The cost of obtaining a transcript should not be an impediment to an applicant for post-conviction relief, for that financial burden is not borne by the applicant. This section imposes upon the state the responsibility to pay for the transcription. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).

Waiver.

An inmate, who was served with a copy of the court's decision to award attorney fees and costs to the state for its response to inmate's second post-conviction relief application and who was also given a copy of the state's memorandum of cost, but who did not file any objection as allowed by the Rules of Civil Procedure, has waived the right to further contest the award. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Collateral References. Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases. 105 A.L.R.5th 529.

19-4902. Commencement of proceedings — Verification — Filing — Service — DNA testing. — (a) A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place. An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The supreme court may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the prosecuting attorney.

(b) A petitioner may, at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the

technology for the testing was not available at the time of trial. The petition must be filed by July 1, 2002, or within one (1) year after the filing of the judgment of conviction, whichever is later. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the prosecuting attorney.

(c) The petitioner must present a prima facie case that:

(1) Identity was an issue in the trial which resulted in his or her conviction; and

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced or altered in any material aspect.

(d) The trial court shall allow the testing under reasonable conditions designed to protect the state's interests in the integrity of the evidence and the testing process upon a determination that:

(1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and

(2) The testing method requested would likely produce admissible results under the Idaho rules of evidence.

(e) In the event the fingerprint or forensic DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief.

(f) The cost of the forensic DNA test shall be at the petitioner's expense, except to the extent the petitioner qualifies for the test at public expense pursuant to chapter 8, title 19, Idaho Code, in which case the fingerprint or forensic DNA test shall be performed by, and paid for by funds allocated for, Idaho state police forensic services. [1967, ch. 25, § 2, p. 42; am. 1979, ch. 133, § 1, p. 428; am. 1988, ch. 76, § 1, p. 131; am. 1993, ch. 265, § 1, p. 898; am. 1996, ch. 420, § 2, p. 1398; am. 2001, ch. 317, § 3, p. 1126.]

Compiler's notes. Section 2 of S.L. 1993, ch. 265 is compiled as § 19-4904.

Sections 1 and 3 of S.L. 1996, ch. 420 are compiled as §§ 11-108 and 20-209E, respectively.

Sec. to sec. ref. This section is referred to in §§ 19-2719 and 19-4901.

Cited in: Clark v. State, 92 Idaho 827, 452 P.2d 54 (1969); State v. Vetsch, 101 Idaho 595, 618 P.2d 773 (1980); State v. Goodrich, 104 Idaho 469, 660 P.2d 934 (1983); Lindquist v. Gardner, 770 F.2d 876 (9th Cir. 1985); Johnson v. State, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987); Wolfe v. State, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987); State v. Beam, 115 Idaho 208, 766 P.2d 678 (Ct. App. 1988); Housley v. State, 119 Idaho 885, 811 P.2d 495 (Ct. App. 1991); Hoffman v. State, 124 Idaho 281, 858 P.2d 820 (Ct. App. 1993); Eubank v. State, 130 Idaho 861, 949 P.2d 1068 (Ct. App. 1997); McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000); Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999).

ANALYSIS

Appeal.

Application.

—Limitation periods.

—Period of limitation.

—Proper filing.

—Proper form.

—Prospective.

Beginning of limitation period.

Extension of limitation period.

Habeas corpus.

Legislative intent.

Pending appeal.

Timely application.

—Proper forms.

Untimely application.

Venue.

Appeal.

Post-conviction relief was granted where, although attorney's failure to advise client of his right of allocution and to provide defendant with a copy of his presentence report did not constitute inadequate representation, de-

defendant's verified application stating that attorney declined to file an appeal, despite defendant's request, did require an evidentiary hearing on the ineffective counsel issue. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Ct. App. 1993).

Where petitioner timely informed his attorney of his desire to appeal in both a phone conversation and a letter, and his attorney failed to appeal, petitioner has demonstrated that, but for his attorney's errors, he would have appealed his sentence. He has, therefore, shown prejudice to excuse his procedural default. *Manning v. Foster*, 224 F.3d 1129 (9th Cir. 2000).

Application.

Application of the five-year limitation to a conviction entered before the effective date of the 1979 amendment was not unfair ex post facto application. *Mellinger v. State*, 113 Idaho 31, 740 P.2d 73 (Ct. App. 1987).

The five-year limitation period for filing an application for post-conviction relief mandated by the 1979 amendment to this section applies to a conviction entered before the effective date of the amendment. *Mellinger v. State*, 113 Idaho 31, 740 P.2d 73 (Ct. App. 1987).

A strict application of the five-year limitation would have the effect of depriving defendant, who in 1978 pled guilty to murder and who in 1986 was denied parole, of his claim under the Uniform Post-Conviction Procedure Act before the claim actually arose, and such a result would be "manifestly unjust" and "inconsistent with the concept of fundamental justice." *LaFon v. State*, 119 Idaho 387, 807 P.2d 66 (Ct. App. 1991).

The addition of the five-year limitation to this section constituted a procedural change and, at least with respect to defendant's allegations that he was coerced into pleading guilty, did not operate to increase his punishment. *LaFon v. State*, 119 Idaho 387, 807 P.2d 66 (Ct. App. 1991).

The five-year limitation in this section is applicable to cases where convictions were entered prior to the 1979 amendment hereto which added the limitation period; in such cases, the five-year period began to run on July 1, 1979, the effective date of the amendment. *LaFon v. State*, 119 Idaho 387, 807 P.2d 66 (Ct. App. 1991).

The decision in *Browning v. Vernon*, 874 F.Supp. 1112 (D. Idaho 1994), aff'd, 44 F.3d 818 (9th Cir. 1995), although it mandated that inmates be allowed to contact counsel by telephone to prepare for jurisdictional review hearing and was thus a departure from Idaho precedent, did not give defendant a new claim for post-conviction relief as this is not a deprivation of due process; no new limitation period was initiated and dismissal of claim as

time barred was affirmed. *John v. State*, 129 Idaho 304, 923 P.2d 1011 (Ct. App. 1996).

Under the terms of this section, a trial court, in determining whether the applicant for post-conviction relief is not entitled to such relief, is not limited to defenses pled by the State. A trial court may issue a notice of its intent to dismiss before the State has filed any response whatsoever to the application and, as such, it was proper for the district court to consider the statute of limitations though this defense was not raised by the State. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Time for filing a post-conviction application challenging a judgment of conviction or sentence does not start anew from the entry of a probation revocation order; rather, any post-conviction action filed within the limitations period connected to the probation revocation order, but beyond the limitations period measured from the appeal period for the judgment of conviction, may address only issues that arise from the probation revocation proceeding. *Gonzalez v. State*, — Idaho —, 79 P.3d 743 (Ct. App. 2003).

—Limitation Periods.

Application of this section is not retroactive, and where defendant had full term allowed by this section in which to file petition for post-conviction relief, none of defendant's substantial rights were violated by the application of the limitation period. *Esquivel v. State*, 128 Idaho 390, 913 P.2d 1160 (1996).

Where defendant's judgment of conviction became final when it was affirmed on appeal in July, 1992, and there was no remand from the appellate court for further proceedings in the criminal action, it follows that defendant's motion for preparation of the trial transcript for use in his post-conviction relief action did not affect the time for filing an action for post-conviction relief. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Imposition of a one-year limit on defendant's right to file an application for post-conviction relief did not violate defendant's right to due process of law. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Defendant's contention that he was deprived of his constitutional right of access to the courts because he was prevented from pursuing a post-conviction relief action due to his incarceration in a foreign prison which did not offer a law library with access to Idaho law books was foreclosed due to the fact that defendant was represented by a private Idaho counsel who had the opportunity to file an application for post-conviction relief on defendant's behalf within the period of limitation. Since defendant did not file his post-conviction relief application within one year of gaining the ability to access the Idaho court's

through his privately retained Idaho counsel, his application was barred by the limitation period of this section. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Although defendant asserted facts, which, if true, amounted to a deprivation of his right of access to the Idaho courts, and this deprivation may have temporarily tolled the statute of limitation, such tolling ceased when defendant retained an Idaho attorney, and where defendant did not file his application for post-conviction relief within the one-year limitation period, the application was appropriately dismissed. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

—Period of Limitation.

Defendant's suggestion that because she was incarcerated in an institution which did not have a law library or law-trained inmates as clerks, who could have advised her about the amendment to period of limitation for this section, her right to access to the courts was impaired was without merit, as defendant presented no evidence in the district court to prove allegations or raise a factual issue regarding her claim. *Reyes v. State*, 128 Idaho 413, 913 P.2d 1183 (Ct. App. 1996).

Defendant's argument that the shortened statute of limitation was an unconstitutional ex post facto law when applied to individuals, who, like defendant, were convicted prior to its passage was without merit, as the period of one year from the effective date of the amendment to this section provided a reasonable amount of time in which to file an application and was not, therefore, an impermissible ex post facto law. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Summary judgment under I.R.C.P. 56(c) was properly granted in favor of two clerks in an inmate's 42 U.S.C.S. § 1983 action because the inmate was unable to show an actual injury since the 1,800 pages of exhibits that he wanted to file but the clerks did not allow were unnecessary to the filing of the inmate's petition for post-conviction relief; moreover, the inmate did not establish that the petition in question was not frivolous because the petition was barred by the statute of limitations, and it was a successive petition. *Drennon v. Hales*, 138 Idaho 850, 70 P.3d 688 (Ct. App. 2003).

—Proper Filing.

An application for post-conviction relief is properly filed when it is filed with the district court clerk. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

—Proper Form.

Letter written by defendant to trial court did not constitute a post-conviction application even though it properly set forth the date

of conviction; the letter did not state any relief desired, set forth verified facts supporting the application that would have entitled him to post-conviction relief, offer any other evidence for support of the claims, or identify any previous proceedings taken by defendant to secure relief. *Mills v. State*, 126 Idaho 330, 882 P.2d 985 (Ct. App. 1994).

—Prospective.

The application of this section is prospective and not retrospective. *LaFon v. State*, 119 Idaho 387, 807 P.2d 66 (Ct. App. 1991).

Where the constitutional grounds upon which petitioner based his petition for post-conviction relief existed prior to a recent federal court decision (*Browning v. Bernon*, 874 F. Supp. 1112), which enjoined certain procedures used at the same correctional institution where petitioner was confined upon finding that these procedures were violations of inmates' due process rights, the district court did not err in holding that the subsequent federal decision did not apply retroactively to petitioner's claim nor did it create a new right of action that was not barred by the statute of limitations. *Bell v. State*, 128 Idaho 62, 910 P.2d 176 (Ct. App. 1996).

As regards a post-conviction relief a "proceeding following an appeal" means a proceeding conducted in the criminal action, not in collateral judicial proceedings. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Beginning of Limitation Period.

Where a petition for a writ of certiorari was filed following the denial of the appeal in the state courts, and where petition for writ of certiorari was denied, the limitation period begins to run on the date of the later denial. *Atkinson v. State*, 131 Idaho 222, 953 P.2d 662 (Ct. App. 1998).

Because an order revoking an appeal bond following the issuance of a remittitur is not a proceeding following an appeal under this section, the limitation period for the defendant to file an application for post-conviction relief began to run when the appellate court issued the remittitur. *Cochran v. State*, 133 Idaho 205, 984 P.2d 128 (Ct. App. 1999).

Extension of Limitation Period.

It would be contrary to the legislative intent of § 19-4902, to set a definite time limit upon challenges to convictions and sentences, to allow the limitation period to be extended by the filing of a Rule 35 motion, when the denial of a Rule 35 motion is not itself reviewable under the Uniform Post-Conviction Procedure Act. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).

Although a Uniform Post-Conviction Procedure Act (UPCPA) proceeding may be commenced after the "determination of a proceed-

ing following an appeal" the time limit to file an application under the UCPA is not renewed or extended by any other collateral post-judgment proceeding. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992), cert. denied, 511 U.S. 1011, 114 S. Ct. 1386, 128 L. Ed. 2d 60 (1994).

The language "within five years ... from the determination of a proceeding following an appeal," does not mean that the five-year limitation for bringing an application begins anew after "determination" of each successive post-conviction petition. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992), cert. denied, 511 U.S. 1011, 114 S. Ct. 1386, 128 L. Ed. 2d 60 (1994).

Where statute of limitations was reduced from five years to one year for purposes of commencing appeals, plaintiff had opportunity to discover change in statute in time to commence appeal, and is not entitled to an extension of time. *Chapman v. State*, 128 Idaho 733, 918 P.2d 602 (Ct. App. 1996).

Habeas Corpus.

Although the time limitation for filing a post-conviction relief application under this section will expire before defendant's eligibility for parole occurs, the proper method of challenging the parole board's alleged discrimination against sex offenders is a petition for a writ of habeas corpus after defendant has been denied parole. *Stillwell v. State*, 124 Idaho 366, 859 P.2d 964 (Ct. App. 1993), cert. denied, 511 U.S. 1056, 114 S. Ct. 1619, 128 L. Ed. 2d 345 (1994).

Legislative Intent.

A reading of this section clearly reveals the legislature's intent to make the time period for bringing an application for post-conviction relief limited by the time period in which the applicant could have perfected a direct appeal from the underlying judgment of conviction, plus five years. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).

If a statute of limitation did not begin to run until the plaintiff became aware of the limitation, there would not be a discrete period applicable to all actions subject to the same limitation and such a situation would be clearly contrary to the terms established by the legislature in this section. *Reyes v. State*, 128 Idaho 413, 913 P.2d 1183 (Ct. App. 1996).

The amendment to this section shortening the time period allowed for filing an application for post-conviction relief did not constitute an ex post facto change where the applicant was afforded the full time allowed by the amendment to file, as such a situation would be clearly contrary to the terms established by the legislature in this section. *Reyes v. State*, 128 Idaho 413, 913 P.2d 1183 (Ct. App. 1996).

Pending Appeal.

Generally post-conviction relief is available while an appeal is pending, but there are exceptions. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Timely Application.

Where petitioner's application for post-conviction relief on the grounds that he had been denied the effective assistance of counsel with respect to the revocation of his probation was filed within five years of the probation revocation proceeding, his petition was timely filed. *Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct. App. 1993).

Where district court failed to rule on defendant's request for appointed counsel defendant's ineffective assistance of counsel claim based on failure of counsel to present to the district court as part of a Rule 35 motion, an independent psychological evaluation, was properly raised through post-conviction procedures by application filed within one year of the expiration of the time for appeal from the order denying the Rule 35 motion and thus was timely and where court failed to rule on such claim, defendant was prejudiced for had counsel been appointed to represent him, presumably such attorney would have responded to the court's dismissal notice and kept alive defendant's post-conviction claim related to the Rule 35 proceeding. *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

A Rule 35 motion filed more than 14 days after entry of the judgment does not affect the starting point for calculating the time within which an application for post conviction relief may be brought and thus defendant's Rule 35 motion did not operate to extend the relevant time limit governing the filing of his post-conviction relief application. *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

— Proper Forms.

Although it would be prudent for an applicant to allege facts which he contends would avoid the time bar when an application is filed outside the one-year period specified in this section, the absence of such allegations in the initial pleading is not fatal to an applicant's claims. *Anderson v. State*, 133 Idaho 788, 992 P.2d 783 (Ct. App. 1999).

Untimely Application.

Where the state made a motion to dismiss the petitioner's application for post-conviction relief on the sole ground that it was not timely filed under this section, but the district court, upon its own initiative, decided instead to dismiss the case upon its merits, the district court erred by not giving the petitioner an opportunity to reply within 20 days of the proposed dismissal as required by § 19-4906(b), since the petitioner thus was not

given any opportunity to convince the district court that he should have prevailed upon the merits. *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (Ct. App. 1982).

Because defendant's motion was properly treated as a petition for post-conviction relief, rather than as a writ of habeas corpus, the limitation period established by this section was applicable to the motion. *Gomez v. State*, 120 Idaho 632, 818 P.2d 336 (Ct. App. 1991).

Where it was undisputed that no appeal was ever taken from the judgment of conviction entered against defendant on October 11, 1984, defendant had until November 22, 1984, 42 days from the day judgment was entered against him to appeal his judgment of conviction; thus, under this section, defendant was barred from making an application for post-conviction relief more than five years after November 22, 1984; therefore, defendant's application was untimely and the District Court did not err in dismissing his application. *Hanks v. State*, 121 Idaho 153, 823 P.2d 187 (Ct. App. 1992).

The direct appeal of defendant's 1982 judgment of conviction resulted in an opinion affirming the conviction and sentence ordered by the court. The Court of Appeals calculated five years from the determination of defendant's direct appeal—issuance of a remittitur—to be on or about February 21, 1991. To defendant's detriment, the date of the filing of his latest petition exceeded that date by approximately six months. Therefore, the petition filed by defendant was untimely. *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992), cert. denied, 511 U.S. 1011, 114 S. Ct. 1386, 128 L. Ed. 2d 60 (1994).

Inmate, whose habeas corpus petition alleged his guilty plea was not voluntary and therefore his conviction and sentence were invalid, was denied relief where he filed his petition six and one-half years after his judgment of conviction; the remedy for such a challenge is the Uniform Post-Conviction Procedures Act in the county where convicted. *Morris v. State*, 123 Idaho 549, 850 P.2d 198 (Ct. App. 1993).

Although district court committed error in

failing to act upon defendant's motion for appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred more than a year before his application was filed and therefore frivolous; dismissal of application for post-conviction relief affirmed. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

Question presented was whether the petition for post-conviction relief was timely, because it was filed within one year after the conclusion of petitioner's appeal from the probation revocation order; the appellate court concluded that the petition was not timely, because petitioner's post-conviction petition did not challenge the probation revocation order or proceedings leading up to it, in 2000, rather, the petition challenged only the validity of the judgment of conviction and sentence, imposed in January 1990. *Gonzalez v. State*, — Idaho —, 79 P.3d 743 (Ct. App. 2003).

Venue.

Where petitioner filed in district court other than in county where he had been convicted his petition was denied, but since the allegations in the petition, if true, would have afforded grounds for relief, he was granted leave to refile in the proper district court, although a similar petition previously had been dismissed in that court on procedural grounds. *Still v. State*, 95 Idaho 766, 519 P.2d 435 (1974).

Because defendant's petition challenged the validity of his conviction, it presented an issue of post-conviction relief that should have been brought pursuant to the UPCPA and not as a habeas corpus petition and because an application for post-conviction relief must be filed in the district court where the conviction occurred and it was not, dismissal was affirmed. *Abbott v. State*, 129 Idaho 381, 924 P.2d 1225 (Ct. App. 1996).

Collateral References. Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail. 98 A.L.R.5th 445.

19-4903. Application — Contents. — The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-4902. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by

the applicant to secure relief from his conviction or sentence. Argument, citations, and discussion of authorities are unnecessary. [1967, ch. 25, § 3, p. 42.]

Cited in: *Pulver v. State*, 92 Idaho 627, 448 P.2d 241 (1968); *State v. Vetsch*, 101 Idaho 595, 618 P.2d 773 (1980); *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987); *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994); *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996); *Jakoski v. State*, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001); *Goodwin v. State*, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002); *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

ANALYSIS

Construction with other law.

In general.

Sufficiency of application.

— Proper form.

Summary dismissal.

Construction With Other Law.

Although defendant did not file a timely motion to withdraw his guilty plea pursuant to ICRR 33(d), he was not foreclosed from pursuing post-conviction relief challenging his guilty plea. *Odiaga v. State*, 130 Idaho 915, 950 P.2d 1254 (1997).

Petitioner seeking post-conviction relief was not entitled to tolling of the statute of limitations because he was unable to gain access to his case file so that he could file a timely petition. Nothing in the Uniform Post-Conviction Procedure Act requires the petitioner to obtain the records from his underlying criminal case as a prerequisite to filing a petition; in fact, Idaho Code § 19-4906(a) places that burden on the state. *Sayas v. State*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 129 (Ct. App. Dec. 3, 2003).

In General.

An application for post-conviction relief initiates a proceeding which is civil in nature. *LaBelle v. State*, 130 Idaho 115, 937 P.2d 427 (Ct. App. 1997).

Sufficiency of Application.

A petition by an inmate of the state penitentiary which alleges that his imprisonment is illegal because of failure to furnish him counsel when it was apparent that he did not have education sufficient to understand the processes of law, failure to inform him of his rights, and his waiver of rights without understanding the consequence of such waiver presented facts sufficient to require proceedings under this chapter. *Higheagle v. State*, 91 Idaho 921, 435 P.2d 261 (1967).

Allegation in motion for post-conviction relief that defendant was possessed of facts which would have proved his innocence, but which were not brought forth on advice of counsel, did not entitle him to an evidentiary hearing on the petition, where such petition failed to disclose what these facts were and he waived any defenses based on such facts which he claimed would have proved him innocent by his plea of guilty. *Pulver v. State*, 93 Idaho 687, 471 P.2d 74 (1970), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

A conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing; where the defendant made only conclusory allegations about the effect of pretrial publicity on witness identifications, the trial court did not err in implicitly requiring the defendant to factually support his allegations. *Baruth v. Gardner*, 110 Idaho 156, 715 P.2d 369 (Ct. App. 1986).

Subdivision (b) of § 19-4906 permits the district court to dismiss an application for post-conviction relief unless it contains allegations which, if proved, would entitle the defendant to the remedy sought; implicit in this standard is the requirement that all necessary allegations be made in the application. *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992).

Because defendant did not support his claims of coercion, duress, or other illegal tactics, with affidavits, documents, or any evidence to support his allegations, no material issues of fact were presented and the court properly granted summary judgment to the state dismissing the petition. *Nielson v. State*, 121 Idaho 779, 828 P.2d 342 (Ct. App. 1992).

Where defendant filed an application for post-conviction relief pursuant to § 19-4907(a), the Court of Appeals held that such an action was a special proceeding that was civil in nature and like a civil plaintiff, the defendant-applicant had to prove, by a preponderance of the evidence, the allegations upon which the request for relief was based and the application had to have presented or must have been accompanied by admissible evidence supporting its allegations, or the application would be subjected to dismissal under this section. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

An application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the

application must state why such supporting evidence is not included with the petition. *Hassett v. State*, 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995).

The application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

An application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

An application for post-conviction relief initiates a proceeding which is civil in nature and the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Fenstermaker v. State*, 128 Idaho 285, 912 P.2d 653 (Ct. App. 1995).

An application for post-conviction relief differs from a complaint in an ordinary civil action, however, for an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1); rather an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the petition. *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996).

—Proper Form.

Letter written by defendant to trial court did not constitute a post-conviction application even though it properly set forth the date of conviction; the letter did not state any relief desired, set forth verified facts supporting the application that would have entitled him to post-conviction relief, offer any other evidence for support of the claims, or identify any previous proceedings taken by defendant to secure relief. *Mills v. State*, 126 Idaho 330, 882 P.2d 985 (Ct. App. 1994).

An application for post-conviction relief differs from a complaint in an ordinary civil action as application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1), rather, an application for

post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995); *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

An application for post-conviction relief differs from a complaint in an ordinary civil action, because such an application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached or a reason for their non-inclusion given. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

Defendant's asserted mental incompetence following his incarceration which allegedly prevented him from pursuing his post-conviction relief action was not an element of his claim for relief but a response to the state's affirmative defense that the claim was time barred. Therefore, it was not necessary for defendant to include allegations about his post-conviction mental health in the application for hearing, because to hold otherwise would require inmates, who are untrained in the law and often acting without the benefit of counsel in the preparation of their applications, to anticipate possible affirmative defenses and negate them even before the affirmative defense has been pleaded. *Anderson v. State*, 133 Idaho 788, 992 P.2d 783 (Ct. App. 1999).

Summary Dismissal.

This section authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the petitioner to the requested relief. *Fenstermaker v. State*, 128 Idaho 285, 912 P.2d 653 (Ct. App. 1995).

An application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct. App. 1998); *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

19-4904. Inability to pay costs. — If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney may be made available to the applicant in

the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed. [1967, ch. 25, § 4, p. 42; am. 1993, ch. 265, § 2, p. 898.]

Compiler's notes. Section 1 of S.L. 1993, ch. 265 is compiled as § 19-4902.

Sec. to sec. ref. This section is referred to in § 19-853.

Cited in: Phillips v. State, 108 Idaho 405, 700 P.2d 27 (1985); Wolfe v. State, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987); West v. State, 123 Idaho 250, 846 P.2d 252 (Ct. App. 1993); Smith v. State, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

ANALYSIS

Attorney's lack of diligence.

Discretion of court.

Harmless error.

Request for attorney.

Right to counsel.

Attorney's Lack of Diligence.

The district court did not err in denying defendant's motion to interject the issue of his court-appointed attorney's lack of diligence with respect to an initial motion for post-conviction relief where such issue was raised in a subsequent application for such relief, and defendant's due process rights were not violated by this denial. *Gee v. State*, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990).

Discretion of Court.

Where magistrate exercised discretion in denying prisoner's request for court-appointed counsel, magistrate's denial was affirmed as this section does not mandate appointment of counsel. *Banks v. State*, 128 Idaho 886, 920 P.2d 905 (1996).

The district court did not abuse its discretion when it denied the defendant's request for court-appointed counsel, where the only issue before the court was a claim that defense counsel should have filed an I.C.R. 35 motion and the court found that claim to be frivolous and one that a "reasonable person with adequate means would not bring." *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

The statutory right to counsel to which the applicant was entitled at the time of his initial application for post-conviction relief did not extend to any successive petitions in light of the 1993 amendment to this section which gives discretion to the district court to appoint counsel upon an applicant's request. *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000).

Harmless Error.

Although district court committed error in failing to act upon defendant's motion for

appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred more than a year before his application was filed and therefore frivolous; dismissal of application for post-conviction relief affirmed. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

Request for Attorney.

Where the District Court was aware that a petitioner had been incarcerated for over five years and was represented by a public defender in the previous proceeding, the District Court erred in not addressing petitioner's request for a court-appointed attorney. *Henderson v. State*, 123 Idaho 51, 844 P.2d 33 (Ct. App. 1992).

Defendant's request for court appointed counsel should have been determined prior to disposing of defendant's post-conviction petition; thus, the order of dismissal of the petition for post-conviction relief was vacated and remanded to the district court. *State v. Ortiz*, 124 Idaho 67, 856 P.2d 104 (Ct. App. 1993), modified on other grounds, *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

Right to Counsel.

No right to counsel exists during post-conviction proceedings; therefore, applicant's claim that his post-conviction counsel was ineffective is without merit. *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

Where district court failed to rule on defendant's request for appointed counsel defendant's ineffective assistance of counsel claim based on failure of counsel to present to the district court as part of a Rule 35 motion, an independent psychological evaluation, was properly raised through post-conviction procedures by application filed within one year of the expiration of the time for appeal from the order denying the Rule 35 motion and thus was timely and where court failed to rule on such claim, defendant was prejudiced for had counsel been appointed to represent him, presumably such attorney would have responded to the court's dismissal notice and kept alive defendant's post-conviction claim related to the Rule 35 proceeding. *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

The decision to grant or to deny a request for court-appointed counsel lies within the discretion of the court. When presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Fox v. State*,

129 Idaho 881, 934 P.2d 947 (Ct. App. 1997).

Although this section, as amended, no longer mandates appointment of counsel in post-conviction proceedings, § 19-852 provides that a needy person convicted of a serious crime is entitled to be represented unless the court determines that the proceeding is frivolous. Therefore, the district court erred by denying appointment of counsel, by

not mentioning § 19-852, or finding that defendant's petition for post-conviction relief was frivolous. *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001).

Appointment of counsel in postconviction cases is governed only by Idaho Code § 19-4904. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

19-4905. Costs of state. — All costs and expenses necessarily incurred by the state in the proceedings shall be paid by the county in which the application is filed. [1967, ch. 25, § 5, p. 42.]

19-4906. Pleadings and judgment on pleadings. — (a) Within 30 days after the docketing of the application, or within any further time the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall take account of substance regardless of defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

(b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

(c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [1967, ch. 25, § 6, p. 42.]

Cited in: *Smith v. State*, 94 Idaho 469, 491 P.2d 733 (1971); *Still v. State*, 95 Idaho 766, 519 P.2d 435 (1974); *Schmidt v. State*, 103 Idaho 340, 647 P.2d 796 (Ct. App. 1982); *Bates v. State*, 106 Idaho 395, 679 P.2d 672 (Ct. App. 1984); *Brooks v. State*, 108 Idaho 855, 702 P.2d 893 (Ct. App. 1985); *Svenson v. State*, 110 Idaho 161, 715 P.2d 374 (Ct. App. 1986); *Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987); *Matthews v. State*, 113 Idaho

83, 741 P.2d 370 (Ct. App. 1987); *Noel v. State*, 113 Idaho 92, 741 P.2d 728 (Ct. App. 1987); *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987); *Dyer v. State*, 769 Idaho 1145, 769 P.2d 1145 (Ct. App. 1989); *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991); *Nielson v. State*, 121 Idaho 779, 828 P.2d 342 (Ct. App. 1992); *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992); *Henderson v. State*, 123 Idaho 51, 844 P.2d 33

(Ct. App. 1992); *State v. Nickerson*, 126 Idaho 818, 892 P.2d 493 (Ct. App. 1995); *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996); *Cootz v. State*, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996); *State v. Mathews*, 129 Idaho 865, 934 P.2d 931 (1997); *Parra v. State*, 129 Idaho 950, 935 P.2d 213 (Ct. App. 1997); *Berg v. State*, 131 Idaho 517, 960 P.2d 738 (1998); *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000); *Hernandez v. State*, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999); *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001); *State v. Izzard*, 136 Idaho 124, 29 P.3d 961 (Ct. App. 2001); *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002); *Goodwin v. State*, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002).

ANALYSIS

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Additional Issues.

An applicant must file an amended application when he desires to raise additional issues in a post-conviction case. *Cowger v. State*, 132

Idaho 681, 978 P.2d 241 (Ct. App. 1999).

Appealable Orders.

A petitioner could not appeal, prior to actual dismissal of his petition, from a court order that, unless petitioner presented new and additional grounds for relief within 20 days, his petition would be dismissed. *Pulver v. State*, 92 Idaho 627, 448 P.2d 241 (1968).

On review of a dismissal of a post-conviction application without an evidentiary hearing, Court of Appeals will determine whether a genuine and material issue of fact was demonstrated in the record and whether one party was entitled to judgment as a matter of law. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Application.

Under the terms of this section, a trial court, in determining whether the applicant for post-conviction relief is not entitled to such relief, is not limited to defenses pled by the State. A trial court may issue a notice of its intent to dismiss before the State has filed any response whatsoever to the application and, as such, it was proper for the district court to consider the statute of limitations though this defense was not raised by the State. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Burden of Proof.

The petitioner for post-conviction relief has the burden of proving by a preponderance of the evidence the allegations which he contends entitle him to relief. *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986).

Defendant convicted of possession of a controlled substance was not entitled to relief on claim of ineffective assistance in that counsel failed to file a pretrial motion to suppress where nowhere in application or supporting affidavits did defendant present evidence to explain how the search was unreasonable or otherwise illegal, so as to justify suppression of the evidence derived therefrom. *State v. Ayala*, 129 Idaho 911, 935 P.2d 174 (Ct. App. 1996).

Construction of Pleadings.

In considering an application for post-conviction relief, the court looks to the substance and disregards defects of form. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969).

Construction with Rules.

Summary dismissal of an application pursuant to this section is the procedural equivalent of summary judgment under I.R.C.P. 56. *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

Criminal Trial Record.

Although a post-conviction relief application initiates a new and independent civil

action, there is no reason why the judge in that action cannot take judicial notice of the record in the criminal case. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

In post-conviction proceeding, the district court did not err in determining the facts by resorting to the criminal trial record instead of relying wholly upon the civil record as outlined in this section. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Petitioner seeking post-conviction relief was not entitled to tolling of the statute of limitations because he was unable to gain access to his case file so that he could file a timely petition. Nothing in the Uniform Post-Conviction Procedure Act requires the petitioner to obtain the records from his underlying criminal case as a prerequisite to filing a petition; in fact, Idaho Code § 19-4906(a) places that burden on the state. *Sayas v. State*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 129 (Ct. App. Dec. 3, 2003).

Cruel and Unusual Punishment.

To the extent that an Eighth Amendment "cruel and unusual punishment" issue is raised, post-conviction proceedings are appropriate. *Whitehawk v. State*, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

Denial of Competent Counsel.

Where defendant's counsel interviewed prospective witnesses and determined that their testimony would either not be helpful, or would be irrelevant or damaging to defendant's defense, his refusal to call them at trial did not indicate that defendant was denied reasonably competent assistance of counsel since the reviewing court cannot second-guess strategic and tactical decisions of trial counsel; thus, it was not error for trial court to dismiss application for post-conviction relief under this section without affording an evidentiary hearing since the allegations of defendant did not entitle him to relief. *State v. Larkin*, 102 Idaho 231, 628 P.2d 1065 (1981).

The failure of counsel to locate and subpoena witnesses is not, in and of itself, grounds for post-conviction relief based upon alleged ineffective assistance of counsel. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Where a defendant claims that he was denied the effective assistance of counsel, it is not sufficient by itself to show that he has been denied reasonably competent assistance of counsel; in addition, it must be shown that the conduct of counsel contributed to the conviction. *Drapeau v. State*, 103 Idaho 612,

651 P.2d 546 (Ct. App. 1982).

Post-conviction relief cannot be granted upon allegedly inadequate assistance of competent counsel where there is no evidence of prejudice resulting from the activity, or lack of activity, of counsel and bald and unsupported allegations regarding conferences with counsel and pretrial discovery, unsubstantiated by any proffered facts, are insufficient to entitle a defendant to an evidentiary hearing on his post-conviction application. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Where the defendant was tried for second-degree murder and assault with intent to commit murder, and a review of the trial record showed that his defense counsel was well acquainted with both the relevant law and the facts of the case, that he pursued all relevant evidence, that he thoroughly examined and cross-examined the witnesses, that he presented the circumstances of the killing in their most mitigating light, and that the jury convicted the defendant only of voluntary manslaughter, there was no evidence to support the defendant's post-conviction contention that he had been denied effective assistance of counsel at trial. *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983).

Relief cannot be granted upon allegedly inadequate assistance of counsel where there is no evidence of prejudice resulting from the activity or lack of activity of counsel. *Phillips v. State*, 108 Idaho 405, 700 P.2d 27 (1985).

The trial court erred in taking judicial notice of the trial proceedings and in turn erred in dismissing defendant's petition without conducting an evidentiary hearing on the ineffective assistance of counsel claims. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Where allegations of malpractice centered around what appeared to be very risky tactics employed by defense counsel, whether such tactics were part of a designed strategy or were based on ill preparation or ignorance of law was a question of fact. A hearing was required in which defense counsel, and other witnesses, could be examined; therefore, the district court was correct in denying a motion for summary dismissal. *Reynolds v. State*, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994).

In order to survive summary dismissal of an ineffective assistance of counsel claim in a petition for post-conviction relief, petitioner must, among other things, show prejudice, i.e. that but for trial counsel's unprofessional errors, the result of the proceeding would have been different; this will typically require at least some review of the evidence at trial, or the district court will be unable to rationally determine whether petitioner's counsel committed unprofessional errors which affected the outcome; if the petitioner fails to submit an adequate record, the state must do so.

Saykhamchone v. State, 127 Idaho 319, 900 P.2d 795 (1995).

A claim of ineffective assistance of counsel, based upon counsel's alleged failure to timely file a Rule 35 motion, may properly be brought under the post-conviction procedure act. Hassett v. State, 127 Idaho 313, 900 P.2d 221 (Ct. App. 1995).

Summary disposition of application for post-conviction relief was proper in prosecution for lewd conduct and child abuse where defendant claimed that his counsel was ineffective in not seeking an order compelling discovery when state failed to comply with discovery request regarding expert testimony, where defendant did not show how the discovery would have benefited his case, and where it was evident that his counsel had conducted an extensive cross-examination of the expert as counsel was familiar with the articles and bodies of research that formed the basis of the expert's conclusions and questioned her knowledge regarding such articles and research. Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

In prosecution for lewd conduct and child abuse counsel was not ineffective in failing to object to testimony of expert witness in field of child abuse which was limited to explaining the behavioral patterns of and characteristics, in general, of children sexually abused, since the witness acknowledged that she was there only to provide background information and such testimony was properly the kind of testimony suitable for expert opinion because the issues were beyond common experience and were necessary for jury education and clarification of certain child sexual abuse behavioral patterns, and thus summary dismissal of application for post-conviction relief was proper. Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

In prosecution for lewd conduct and child abuse where defendant claimed his counsel was deficient in not requesting that a limiting instruction be given to the jury prior to child's testimony but did not demonstrate that such decision was based on inadequate preparation, ignorance of relevant law or other shortcoming capable of objective evaluation, such decision would not be second guessed and, where such instruction was given to the jury in the final instructions, summary dismissal of application for post-conviction relief was proper. Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

In prosecution for lewd conduct and child abuse where defendant claimed ineffective assistance of counsel, where counsel was a witness when child recanted her bad act allegation in counsel's office but did not testify but there were two other persons present during the recanting both of whom testified regarding the statements made by the child in

counsel's office, there was no deficiency in counsel decision in this regard and court did not err in summarily dismissing application for post-conviction relief. Matthews v. State, 130 Idaho 39, 936 P.2d 682 (Ct. App. 1997).

Where the district court carefully considered the applicant's arguments and concluded that it would not have exercised its discretion by reducing his sentence had a motion been filed under I.C.R. Rule 35, the court did not err in summarily dismissing applicant's ineffective assistance of counsel claim. Cowger v. State, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

Due process only requires that a defendant be informed of direct, as opposed to collateral, consequences of a guilty plea, and the possible consequences of a future probation violation are collateral, not direct; therefore, tangential and remote consequences such as this do not fall among the litany of information of which trial counsel has an affirmative duty to inform a defendant or be deemed deficient. Jakoski v. State, 136 Idaho 280, 32 P.3d 672 (Ct. App. 2001).

Discovery.

Although the civil rules generally apply to proceedings on an application for post-conviction relief, the discovery provisions contained in those rules are not applicable unless specifically ordered by the court; thus, unless necessary to protect an applicant's substantial rights, the district court is not required to order discovery. Griffith v. State, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992).

Although the civil rules generally apply to proceedings on an application for post-conviction relief, the discovery provisions contained in those rules are not applicable unless specifically ordered by the court. Aeschliman v. State, 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999).

Dismissal.

It is not error to dismiss an application without affording an evidentiary hearing if the allegations, though uncontroverted, do not entitle applicant to relief. Clark v. State, 92 Idaho 827, 452 P.2d 54 (1969).

Trial court did not err in granting respondent's motion to dismiss the certified amended petition for post-conviction relief, though motion was unsupported by any affidavits or depositions contradicting the allegations of fact in the petition, where respondent, in his answer to the petition, explored the entire history of appellant's case both in the state and federal courts and referred to the entire state court's proceedings, and pleadings and exhibits in the U.S. Federal District Court. Larsen v. May, 93 Idaho 602, 468 P.2d 866 (1970).

Where no questions of fact were in issue the court was not in error for failing to give

petitioner notice of its intention to dismiss the petition as provided for in subsection (b). *Balla v. State*, 98 Idaho 344, 563 P.2d 402 (1977).

Where an appellant's claim for post-conviction relief was based on ineffective assistance of counsel but the record showed he proceeded with the sentencing hearing despite having been warned by the court of a possible conflict of interest involving his attorney, the district court could not be faulted for dismissing the application for post-conviction relief, although it must adhere to the provisions of subsection (b) of this section in effectuating such dismissal. *Cherniwchan v. State*, 99 Idaho 128, 578 P.2d 244 (1978).

Where the district court failed to notify appellant of its intention to dismiss the application and thus offer appellant an opportunity to reply within 20 days, the judgment denying appellant's application for post-conviction relief would be reversed. *Cherniwchan v. State*, 99 Idaho 128, 578 P.2d 244 (1978).

The district court erred by summarily dismissing the defendant's application for post-conviction relief without granting an evidentiary hearing, where there exists a material issue of fact as to whether the defendant was under the influence of prescribed drugs which affected his ability to make a knowing, voluntary and intelligent guilty plea. *State v. Cobb*, 100 Idaho 116, 594 P.2d 154 (1979).

Where judge gave notice of his intent to dismiss post-conviction proceeding in an extensively detailed notice and no response or reply was received within the time permitted by this section, dismissal of the petition by the judge was proper. *Watkins v. State*, 101 Idaho 758, 620 P.2d 792 (1980), overruled on other grounds, *State v. Broadhead*, 120 Idaho 141, 814 P.2d 401 (1991).

Where either party moves for summary dismissal pursuant to subsection (c) of this section, a 20-day period, such as that provided for statutorily in subsection (b) of this section, is allowed within which a response may be made to the motion for summary disposition so as to afford an opportunity to establish a material fact issue. *State v. Christensen*, 102 Idaho 487, 632 P.2d 676 (1981).

Where the applicant for post-conviction relief contended that he was denied effective assistance of counsel because the public defender represented multiple defendants in his prosecution, but the applicant alleged no facts to support his claim that a conflict of interest existed, the application raised no material issues of fact, and the district court properly treated the application as raising only questions of law, suitable for disposition on the pleadings and the record. *Daugherty v. State*, 102 Idaho 782, 640 P.2d 1183 (Ct. App. 1982).

Where the state made a motion to dismiss

the petitioner's application for post-conviction relief on the sole ground that it was not timely filed under § 19-4902, but the district court, upon its own initiative, decided instead to dismiss the case upon its merits, the district court erred by not giving the petitioner an opportunity to reply within 20 days of the proposed dismissal as required by subsection (b) of this section, since the petitioner thus was not given any opportunity to convince the district court that he should have prevailed upon the merits. *Gibbs v. State*, 103 Idaho 758, 653 P.2d 813 (Ct. App. 1982).

Where a hearing was conducted in which the parties stipulated to the record and presented oral arguments and the trial court made findings and conclusions, it must be concluded that the hearing and order dismissing the petition were pursuant to the procedures provided for in § 19-4907, and not the result of a summary dismissal under subsection (c) of this section. *Deford v. State*, 105 Idaho 865, 673 P.2d 1059 (1983).

A summary dismissal based on the pleadings does not require a hearing; neither does a summary dismissal require the court to file findings of fact and conclusions of law. *Deford v. State*, 105 Idaho 865, 673 P.2d 1059 (1983).

Summary dismissal of a petition for post-conviction relief is appropriate even if the petitioner's alleged facts are uncontroverted by the state, because while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted. *Phillips v. State*, 108 Idaho 405, 700 P.2d 27 (1985).

Petition filed by defendant for post-conviction relief, asserting that he had been denied effective assistance of counsel at trial, was properly dismissed pursuant to subsection (c) of this section, because those ineffective assistance claims raised on direct appeal were barred by res judicata and no material issue of fact existed with respect to defendant's other claims. *LePage v. State*, 109 Idaho 581, 710 P.2d 10 (Ct. App. 1985).

If an application is based upon the same factual question, in virtually the same factual context, as presented in the direct appeal, summary dismissal is appropriate; if an application is based upon facts outside the scope of the pending appeal, summary judgment is not appropriate, but the application may be either dismissed without prejudice or suspended until the appeal is resolved. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Where the petitioner received notice from the court regarding the proposed dismissal of his first two applications and was served notice of the state's motion to dismiss the third, the denial of evidentiary hearings being predicated upon an absence of genuine issues

of material fact, there was no procedural defect in the dismissals, and such dismissals did not deny him due process. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987).

The issue on appeal from the dismissal of an application for post-conviction relief is whether the application alleges facts which if true would entitle the applicant to relief. *Whitehawk v. State*, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

Requirement that inmate be afforded a hearing on a correctional institution's recommendations applies even where the committee recommends probation; however, defendant failed to demonstrate that he suffered some resulting prejudice from summary dismissal under this section without a hearing. *Stillwell v. State*, 124 Idaho 366, 859 P.2d 964 (Ct. App. 1993), cert. denied, 511 U.S. 1056, 114 S. Ct. 1619, 128 L. Ed. 2d 345 (1994).

Even if defendant's allegations that he didn't get to review the presentence report and that the court failed to investigate whether defendant had seen the report were true, the defendant failed to allege any errors or corrections he would have made at sentencing and did not indicate what errors were contained in the presentence report that resulted in prejudice; therefore, the district court properly dismissed defendant's application for post-conviction relief. *Jones v. State*, 125 Idaho 294, 870 P.2d 1 (Ct. App. 1994), cert. denied, 513 U.S. 838, 115 S. Ct. 121, 130 L. Ed. 2d 66 (1994).

Summary dismissal of an application pursuant to subsection (b) of this section is the equivalent of summary judgment under I.R.C.P. 56. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

To avoid summary dismissal of a post-conviction application under subsection (b) of this section, the applicant must present facts showing he is entitled to relief and this presentation must be made in the form of competent, admissible evidence. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Summary dismissal of an application for post-conviction relief may be appropriate even where the state does not controvert the applicant's evidence, because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct. App. 1998).

Where the district court reviewed the record before it, including all of the testimony and evidence presented in two different murder trials, and concluded that a co-defendant's affidavit that defendant had nothing to do with a murder, as newly discovered evidence, probably would not produce an acquittal of the defendant, it did not commit reversible

error when it granted the state's motion for summary disposition. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct. App. 1998).

Summary dismissal of a post-conviction application pursuant to this section is the procedural equivalent of summary judgment under I.R.C.P. 56, and an application that raises only questions of law is suitable for disposition on the pleadings. *Miller v. State*, 135 Idaho 261, 16 P.3d 937 (Ct. App. 2000).

—Appeal of Dismissal.

On appeal from the summary dismissal of a post-conviction application, the court examines the entire record and construes all factual allegations in favor of the applicant to determine if a genuine issue of material fact exists which, if resolved in the applicant's favor, would entitle him to the requested relief. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Under this section, a dismissal of an application for post-conviction relief operates as a determination that the allegations of the application lack merit, and where an applicant timely filed an appeal from an order denying relief on his first application, but the subsequent application was never pursued and as a result, it was ultimately dismissed, the district court's order dismissing the original petition for lack of merit stands undisturbed. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Defendant's failure to respond to the district court's conditional order of dismissal amounted to procedural default precluding consideration of his claims on appeal. *Chavarria v. State*, 131 Idaho 446, 958 P.2d 603 (Ct. App. 1998).

Court overruled its holding in *Sabin v. State*, 129 Idaho 257, 923 P.2d 502 (Ct. App. 1996), that applicants for post-conviction relief who did not respond to a trial court's notice of intent to dismiss thereby waived appellate review of the dismissal order; addressing the merits of the inmate's claims, the instant court affirmed the district court's dismissal of those claims that related to the lack of a presentence investigation report and the remainder of his claims were remanded. *Garza v. State*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 18 (Ct. App. Feb. 27, 2003).

Inmate seeking post-conviction relief who failed to respond to the district court's notice of intent to dismiss his application did not waive his right to appeal the order of dismissal (overruling *Sabin v. State*, 129 Idaho 257, 923 P.2d 502 (Ct. App. 1996) cited following this section under the heading "Waiver" in the 1997 replacement volume). *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

Dismissal under Idaho Code § 19-4906(b), whether the petitioner responds to a notice of intent to dismiss or not, is a determination on

the merits of the claims and is subject to appellate review. The petitioner's failure to respond to the 20-day notice of intent to dismiss does not foreclose appealing the dismissal. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

—Evidence.

The application for post-conviction relief must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

—Improper.

Reversal and remand were required where the court erred in summarily granting the state's motion to dismiss the defendant's application for post-conviction relief eight days after the state's combined answer and motion was filed, since the defendant was not given at least twenty days in which to respond to the motion to dismiss. *Isaak v. State*, 132 Idaho 369, 972 P.2d 1097 (Ct. App. 1999).

—Notice of Intent to Dismiss.

Twenty-day period for replying to the post-conviction court's notice to dismiss an application for relief is as an opportunity to submit an amended application, not a requirement to receiving a ruling on the merits of an application. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

Petitioner who does not respond to the 20-day notice of intent to dismiss loses the opportunity to cure a defect in an application before the district court which might have resulted in a favorable ruling from the district court or presented an adequate record for a valid appeal. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

—Proper.

District court properly dismissed inmate's post-conviction claim that he was denied a presentence investigation report; the inmate refused to see a presentence investigator and thereby waived the preparation of the document. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

—Reasons Requirement.

The basis for the district court's contemplated dismissal as contained in its notice of intent to dismiss was not sufficiently specific to meet the "reasons" requirement of this section. For its rationale, the district court merely echoed the language found in this section and then noted that defendant was not entitled to the relief he sought. Because the district court's notice of intent to dismiss did not adequately notify defendant of the court's reasons, thereby precluding defendant from a meaningful opportunity to reply to the proposed dismissal, the court's order of dis-

missal was vacated. *Banks v. State*, 123 Idaho 953, 855 P.2d 38 (1993).

Notice of intent to dismiss must state the reasons for dismissal in order to provide an applicant with meaningful opportunity to provide further legal authority or evidence that may demonstrate the existence of a genuine factual issue. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

Where district court's notice of intent to dismiss an application for post-conviction relief failed to give the rationale for dismissing the claims, the notice was deemed inadequate and the order dismissing the claims was vacated. *Garza v. State*, — Idaho —, 82 P.3d 445 (2003).

—Review Without Hearing.

On review of a dismissal of a post-conviction application, without an evidentiary hearing, court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file, and the court will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

—Time-barred.

Although district court committed error in failing to act upon defendant's motion for appointed counsel before the court addressed the merits of his application for post-conviction relief, that error was harmless because defendant's alleged claims were time-barred more than a year before his application was filed and therefore frivolous; dismissal of application for post-conviction relief affirmed. *Swisher v. State*, 129 Idaho 467, 926 P.2d 1314 (Ct. App. 1996).

Due Process.

Although the procedure allegedly employed by the prison probation evaluation committee failed to fully comply with the due process requirements enunciated in *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978), where the alleged procedural error only resulted in the omission of evidence that was cumulative and inconsequential, the order denying post-conviction relief was affirmed. *McDonald v. State*, 124 Idaho 103, 856 P.2d 893 (Ct. App. 1993).

Although defendant's initial expectation that he could respond to the dismissal motion by presenting oral testimony at the hearing was unwarranted and contrary to the law governing such proceedings, when the district court nonetheless informed defendant that such testimony would be allowed at a subsequent hearing, defendant became justified in relying upon that promised opportunity; therefore, the summary dismissal of defendant's application was vacated to afford defendant a chance to present evidence of facts

that would prevent the running of the statute of limitations. *Anderson v. State*, 133 Idaho 788, 992 P.2d 783 (Ct. App. 1999).

Filing Transcript.

If the state does not file all relevant portions of the transcript in compliance with this section, the applicant may, by motion to the court, compel the state to do so. However, this section does not relieve an applicant of the consequence of failing to place in evidence a transcript essential to prove the applicant's claim where the applicant made no effort to compel action by the state or to otherwise arrange for the filing of the transcript. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).

Findings and Conclusions.

Where a court grants summary dismissal in a post-conviction relief proceeding pursuant to subsection (c) of this section because it has determined as a matter of law that there are no issues of fact, there is no mandatory requirement that the court make specific findings of fact and conclusions of law as required by § 19-4907 since no purpose would be served by requiring written findings and conclusions. *State v. Christensen*, 102 Idaho 487, 632 P.2d 676 (1981).

Ineffective Assistance of Counsel.

Summary dismissal of petitioner's claim of ineffective assistance of counsel was proper where petitioner presented no facts which would give rise to a genuine issue as to whether the attorney's conduct fell "outside the wide range of professional norms." *Pratt v. State*, 134 Idaho 581, 6 P.3d 831 (2000).

Trial counsel pointed out that expert's proposed testimony was not only beneficial, but also was damaging to petitioner's case; although there were irregularities in the chain of custody of the blood sample, the expert would have been unable to testify that the blood sample was not necessarily rendered unreliable, and because there was no evidence or claim in petitioner's application beyond a bare assertion that petitioner would have altered petitioner's guilty plea, counsel was not ineffective, and the district court properly dismissed the application for postconviction relief. *Gilpin-Grubb v. State*, 138 Idaho 76, 57 P.3d 787 (2002).

In General.

The court may grant a motion for summary disposition of an application for post-conviction relief when it appears from the pleadings and the record that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Larson v. May*, 93 Idaho 602, 468 P.2d 866 (1970); *Cooper v. State*, 96 Idaho 542, 531 P.2d 1187 (1975).

This section provides the procedure by which a summary judgment may be entered in a proceeding under the act; however, such a summary disposition must be made only when there are no genuine issues of material fact. If an issue of material fact exists, then an evidentiary hearing must be held under § 19-4907. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

The issue on appeal from the summary dismissal of an application for post-conviction relief is whether the application alleges facts which, if true, are sufficient to entitle the applicant to relief. *Heartfelt v. State*, 125 Idaho 424, 871 P.2d 841 (Ct. App. 1994).

Summary disposition under this section is the procedural equivalent of summary judgment under I.R.C.P. 56. *Martinez v. State*, 125 Idaho 844, 875 P.2d 941 (Ct. App. 1994).

The district court made its determination based solely on the application itself, finding that the allegations contained therein did not entitle the defendant to relief, and as such the factual and legal issues before the district court were properly framed by the defendant's application and the timeliness of the state's answer was irrelevant. *Bjorklund v. State*, 130 Idaho 373, 941 P.2d 345 (Ct. App. 1997).

This section authorizes summary disposition of Uniform Post-Conviction Procedure Act actions, either pursuant to a motion of a party, or upon the court's own initiative. *Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Knowing and Voluntary Plea.

Defendant's allegations, that he was under the influence of medication which inhibited his ability to properly enter a guilty plea, framed a material issue of fact, namely, whether the medication affected his ability to enter a knowing, intelligent and voluntary plea; therefore, the district court erred in deciding that defendant's guilty pleas were knowingly and voluntarily entered without affording defendant an evidentiary hearing. *West v. State*, 123 Idaho 250, 846 P.2d 252 (Ct. App. 1993).

Material Issue of Fact.

Where allegations in a petition for post-conviction relief that the petitioner was not adequately represented by counsel in his trial for grand larceny and was coerced into a plea of guilty in his prosecution for escape, if true, would entitle the petitioner to relief, it was error to dismiss his petition on motion by the state without controversion of such allegations by the state. *Tramel v. State*, 92 Idaho 643, 448 P.2d 649 (1968).

To justify an evidentiary hearing in a post-conviction relief proceeding, it is incumbent upon the applicant to tender a factual showing based upon evidence that would be admissible at the hearing. His application must be

supported by written statements from witnesses who are able to give testimony themselves as to facts within their knowledge, or must be based upon otherwise verifiable information and absent the witnesses or verifiability of the facts to which they could testify, the application fails to raise material issues of fact sufficient to justify an evidentiary hearing. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Where, in a post-conviction proceeding, the defendant alleged that he had been denied the effective assistance of counsel but he made no factual showing that he was prejudiced either by the alleged infrequency of consultation with his counsel or by counsel's activities regarding pretrial discovery, no material issues of fact existed which would warrant an evidentiary hearing regarding frequency of conferences between the defendant and his counsel or the extent and nature of counsel's pretrial discovery. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Where a material issue of fact existed regarding whether the convicted defendant ever asked his attorney to appeal and whether the attorney disregarded the alleged repeated requests in derogation of the defendant's rights, the court erred in summarily dismissing the defendant's petition for post-conviction relief insofar as it related to the claim that his attorney failed to file an appeal. *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983).

Where factual disputes existed as to whether there was false testimony which induced defendant's guilty plea so as to make it involuntary and where defendant alleged that she was never informed of her constitutional rights, which she waived by pleading guilty, and that she was not informed of the intent element present in a charge of second-degree murder and was not properly informed of the consequences of her plea, including possibilities of parole, the questions of defendant's knowledge of her rights, and her knowing, intelligent and voluntary waiver of such rights were contested issues of fact requiring an evidentiary hearing to resolve. Consequently, it was error for the trial court to grant summarily the petition for post-conviction relief, since there were questions of material fact present. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

Where the defendant's petition for post-conviction relief did not raise material questions of fact which would entitle him to relief, the district court did not err by dismissing the petition without an evidentiary hearing. *Stone v. State*, 108 Idaho 822, 702 P.2d 860 (Ct. App. 1985).

Allegations in an application for post-conviction relief must be deemed to be true until those allegations are in some manner contro-

verted by the state. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

A defendant's allegations that improper or inadequate medical treatment was afforded for this debilitated mental and physical condition while incarcerated constituted genuine issues of fact which required an evidentiary hearing; therefore, dismissal of his petition for post-conviction relief was error. *Whitehawk v. State*, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989).

Evidence consisting of favorable affidavits of people who knew the defendant, that was available to him at the time of trial, and which was cumulative of evidence presented at trial, did not create a material issue of fact which would affect the conviction and/or the sentence imposed on him. *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990).

Where there were material issues of fact concerning the monitoring and recording of the defendant's attorney-client conversations the defendant raised sufficient facts in his second petition to withstand a motion for summary disposition. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990).

Defendant's application for post-conviction relief was improperly dismissed in a summary disposition manner because genuine issues of material fact existed and the district court did not give him notice of its intent to summarily dismiss the petition. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

When the district court dismisses a petition for post-conviction relief it need not issue formal written findings and conclusions, it need only find that there are no genuine issues of material fact and that judgment is appropriate as a matter of law. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Prior to dismissing a petition for post-conviction relief, the District Court is required to obtain that portion of the trial transcript as is necessary to a determination that there are no material issues of fact and that the petitioner is not entitled to post-conviction relief. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Where it appears from the pleadings and any affidavits filed by the parties that no genuine issue of material fact exists, the trial court may summarily dispose of the application. *Bradford v. State*, 124 Idaho 788, 864 P.2d 626 (Ct. App. 1993).

Summary dismissal of a post-conviction application is appropriate only if there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested belief. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct. App. 1995).

On review of a dismissal of a post-conviction application without an evidentiary hearing, court will determine whether a genuine

issue of fact exists and whether any relief is available based on the pleadings, depositions, admissions and affidavits on file. *January v. State*, 127 Idaho 634, 903 P.2d 1331 (Ct. App. 1995).

This section authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative, and summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief since if such a factual issue is presented, an evidentiary hearing must be conducted. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

—Interpreters.

Where transcript suggests Spanish-speaking defendant understood some statements made by the judge, but misunderstood others, and after recognizing that defendant could speak some English, judge only told him to interrupt if he did not understand, so the interpreter could translate, such procedure may have imposed an unfair burden because defendant may have thought that he understood the proceedings when in fact he did not and a continual translation by the interpreter may have solved the problem, but that translation was not made; in a situation such as this, it is preferable to place the affirmative duty on the court to determine that its statements are being understood; therefore summary dismissal of defendant's petition was inappropriate, and he was entitled to an evidentiary hearing on the question of material fact of whether he understood the nature of the charges against him and the maximum punishment which could be imposed. *Gonzales v. State*, 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991).

Motion to Augment Record.

A motion for augmentation of the record, made by the state, which included an affidavit of trial counsel explaining his representation of defendant, would be denied, where this motion to augment was made long after the post-conviction proceeding was submitted to the court; inasmuch as the proper procedure would have been for the state to include the affidavit as part of its response to the application, thus offering the defendant the opportunity to respond, whether by actual examination of the affiant, or by filing an affidavit in response or by other pleading or evidence. *State v. Morris*, 101 Idaho 120, 609 P.2d 652 (1980).

Nature of Proceeding.

A post-conviction relief action is a proceeding that is civil in nature. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct. App. 1995).

Notice.

Subsection (b) of this section, providing for 20 days' notice of proposed dismissal, governs only those situations where the trial court on its own initiative determines to dismiss the petition; the purpose of the notice requirement is to ensure that the petitioner will have the opportunity to challenge an adverse decision before it becomes final. *Baruth v. Gardner*, 110 Idaho 534, 715 P.2d 369 (Ct. App. 1986).

When the court dismisses a case upon a party's motion for dismissal, it must still provide 20 days' notice if the dismissal is based on grounds different from those presented in the motion for dismissal; in such a situation, the motion for dismissal would provide insufficient notice of the reasons for the proposed dismissal. *Baruth v. Gardner*, 110 Idaho 534, 715 P.2d 369 (Ct. App. 1986).

Where the court disposes of the petition for post-conviction relief on grounds set forth in a party's motion for dismissal, the motion for dismissal serves as notice that summary dismissal is being sought, and no additional notice is required to be given by the court. *Baruth v. Gardner*, 110 Idaho 534, 715 P.2d 369 (Ct. App. 1986).

Where the district court dismissed the defendant's petition for post-conviction relief upon the grounds asserted in the state's motion, the state's motion served as sufficient notice to the defendant, and through his appointed counsel, the defendant had the opportunity to challenge the motion to dismiss; therefore, the district court proceeded properly in dismissing the defendant's petition. *Hoover v. State*, 114 Idaho 145, 754 P.2d 458 (1988).

At the very least, the nonmoving party is entitled to reasonable notice regarding a motion for summary disposition, and where defendant's tactic of arguing for summary disposition on the day of trial gave the state and the court no notice whatsoever, the court acted properly in denying the motion. *Wolfe v. State*, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990).

Failure to notify the petitioner of the court's intent and offer petitioner an opportunity to respond requires that a judgment denying application for a petition for post-conviction relief be reversed. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Where record showed that defendant received a summons concerning the probation violation hearing and that because of the nature of the Child Protective Act hearings previously conducted he was reasonably on notice concerning the basis of the probation violation charges, he had adequate notice concerning the nature and substance of the probation violation allegations; however, defendant was not provided with notice by the

district court of its intention to summarily dismiss the petition for post-conviction relief and in the absence of notice being given to him of the court's intention to summarily dismiss the petition, he had no opportunity to respond; thus, the order summarily dismissing his petition for post-conviction relief was reversed. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Although in this case the district court erred by not following the 21 day notice procedure required by this section, the court of appeals found that the error was harmless because there was nothing in the record from which defendant could have established the timeliness of his motion. *Gomez v. State*, 120 Idaho 632, 818 P.2d 336 (Ct. App. 1991).

District court's order of dismissal had to be vacated because the State's motion identified no grounds for dismissal of defendant's various claims, including post-conviction relief under § 19-4901, and was therefore ineffective as presenting notice of deficiencies in defendant's application, and since the district court's subsequent order acted as a sua sponte dismissal on grounds advanced by the court, required notice from the court to comply with the twenty day notice requirement under subsection (b) of this section before dismissing defendant's post-conviction action. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Motions for summary disposition pursuant to this section are procedurally equivalent to motions for summary judgment under I.R.C.P. 56(e) and they are therefore subject to similar notice standards. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

If the district court decides to dismiss an application for post-conviction relief, subsection (b) of this section requires the court to notify the parties of its intention and give the petitioner an opportunity to respond; failure to do so requires reversal of a judgment denying the application for post-conviction relief; however, under subsection (c) of this section, where a party moves to dismiss the application without a hearing, the 20-day notice is not required. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

No 20-day notice is required under subsection (c) of this section when the court grants a motion for summary disposition. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

The reason subsection (b) but not subsection (c) of this section requires the 20-day notice, is because the subsection (c) motion itself serves as notice that summary dismissal is being sought and after the state files a subsection (c) motion, a petitioner is still entitled to 20 days to respond, so as to afford an opportunity to establish a material fact

issue. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

Where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide 20 days notice. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

Because state's motion for summary disposition of defendant's post-conviction application was written in such general terms, did not address the insufficiency of defendant's particular claims, and failed to give defendant notice of any issues or arguments to which he needed to respond, district court's summary dismissal was vacated and remanded to allow for proper notice in order that defendant might respond to the issues raised in the motion with supplemental evidence and argument. *Flores v. State*, 128 Idaho 476, 915 P.2d 38 (Ct. App. 1996).

Where the district court's notice of proposed dismissal merely recited the language of this section, and did not identify with any particularity why the petitioner's evidence or legal theories were deemed to be deficient, the notice was inadequate as a matter of law. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

It is inappropriate for an applicant to be directed by the district court to prepare a notice of proposed dismissal of his own action. *Downing v. State*, 132 Idaho 861, 979 P.2d 1219 (Ct. App. 1999).

Purpose.

Subsection (a) of this section requires the State to respond within 30 days of docketing; the purpose of this requirement is to properly frame any factual and legal issues before the District Court so that it can make an intelligent ruling. *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1991), cert. denied, *Fetterly v. Idaho*, 506 U.S. 1002, 113 S. Ct. 607, 121 L. Ed. 2d 542 (1992).

Section Not Substitute for Appeal.

Where defendant alleged that at time of crime he had ingested prescription drugs and quantities of alcohol sufficient to deprive him of the mental capacity to control his actions or distinguish between right and wrong and entered a plea of guilty to a reduced charge of second-degree murder, but failed to appeal the issue of capacity, he could not substitute the post-conviction procedure under this section as a substitute for appeal. *Watkins v. State*, 101 Idaho 758, 620 P.2d 792 (1980), overruled on other grounds, *State v. Broadhead*, 120 Idaho 141, 814 P.2d 401 (1991).

Sufficiency of Petition.

The bald and unsupported allegation recited by the defendant that he was being held

in custody unlawfully since the plea of guilty was entered under duress, unsubstantiated by any fact, was insufficient to entitle him to an evidentiary hearing. *Pulver v. State*, 93 Idaho 687, 471 P.2d 74 (1970), overruled on other grounds, *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975).

Subsection (b) of this section permits the district court to dismiss an application for post-conviction relief unless it contains allegations which, if proved, would entitle the defendant to the remedy sought; implicit in this standard is the requirement that all necessary allegations be made in the application. *Griffith v. State*, 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992).

The evidence presented by defendant in his claim for post-conviction relief under subsection (b) of this section was sufficient to frame issues of material fact regarding whether defendant's attorney represented to defendant that a plea agreement existed, whether such an agreement was in fact made, whether, if made, it was breached by the State and if no such agreement was made whether defendant's attorney made misrepresentations to defendant constituting ineffective assistance of counsel and, as such, district court erred in summarily dismissing defendant's claim and remand was required for further proceedings on the issue of ineffective assistance of counsel. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Where instead of filing a motion for summary disposition of defendant's petition for post-conviction relief, state filed an answer consisting of admissions and denials of the application's allegations, six affirmative defenses and a request to dismiss the petition, such prayer for relief was deficient for not stating its grounds with particularity and for not stating that it was motion for summary disposition and could not be considered a motion that would permit the court to dismiss the petition without 20 days notice to defendant required under subsection (b) of this section. *Saykhamchone v. State*, 127 Idaho 319, 900 P.2d 795 (1995).

Defendant's claim that he believed a plea agreement existed and that he would have to plead guilty to only one charge was conclusively disproved by the record on review, and defendant's contention regarding application for post-conviction relief that district court should have held an evidentiary hearing on the question of whether he was deprived of ineffective assistance of counsel because his attorney failed to inform him of changes in the terms of the plea agreement was without merit. *Fenstermaker v. State*, 128 Idaho 285, 912 P.2d 653 (Ct. App. 1995).

Where defendant vaguely asserted that he raised genuine factual issues regarding counsel's performance at trial yet did not identify

any and where defendant had not pointed to a single deficiency in trial counsel's performance and did not mention or support allegations that evidence of an out-of-state conviction and confession were inadmissible, district court's summary dismissal of defendant's application for post-conviction relief was affirmed. *Smith v. State*, 129 Idaho 162, 922 P.2d 1088 (Ct. App. 1996).

Because defendant's petition challenged the validity of his conviction, it presented an issue of post-conviction relief that should have been brought pursuant to the UPCPA and not as a habeas corpus petition and because an application for post-conviction relief must be filed in the district court where the conviction occurred and it was not, dismissal was affirmed. *Abbott v. State*, 129 Idaho 381, 924 P.2d 1225 (Ct. App. 1996).

Summary Disposition.

Summary disposition under subsection (b) of this section is the procedural equivalent to summary judgment under IRCP 56. *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987).

A post-conviction application may be dismissed summarily where its allegations, even if true, would not entitle the applicant to relief. *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987).

Summary dismissal may be appropriate even if the applicant's alleged facts are uncontroverted by the state, because while the underlying facts must be regarded as true, the applicant's conclusions need not be so accepted. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987).

Summary disposition of a post-relief application under subsection (c) of this section is the procedural equivalent of summary judgment under I.R.C.P. 56. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).

When the evidence before the court on a motion for summary dismissal fails to frame a genuine issue of material fact, the court may summarily dispose of the application. Accordingly, the question on appeal from the summary dismissal of an application for post-conviction relief is whether the application, affidavits, or other evidence supporting the application allege facts which, if true, would entitle the applicant to relief. *Roman v. State*, 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994).

An application for post-conviction relief is subject to summary dismissal if the applicant has not tendered a factual showing, based upon evidence that would be admissible at an evidentiary hearing, to support his claims for relief. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct. App. 1995).

Summary dismissal is appropriate where the record from the criminal action or other evidence conclusively disproves essential ele-

ments of the applicant's claims. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct. App. 1995).

Summary dismissal of an application pursuant to this section is the procedural equivalent of summary judgment under I.R.C.P. 56. *Medrano v. State*, 127 Idaho 639, 903 P.2d 1336 (Ct. App. 1995).

Summary dismissal is appropriate where the record from the criminal action or other evidence conclusively disproves essential elements of the applicant's claims. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

Summary dismissal of a petition for post-conviction relief may be appropriate, even where the state does not controvert the applicant's evidence as the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

Summary dismissal of an application for post-conviction relief is appropriate where the record from the criminal action or other evidence conclusively disproves essential elements of the applicant's claims. *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

An order for summary disposition of a post-conviction relief application is the procedural equivalent of summary judgment under I.R.C.P. 56. *Carsner v. State*, 132 Idaho 235, 970 P.2d 28 (Ct. App. 1998).

Summary dismissal of an application pursuant to this section is the procedural equivalent of summary judgment under I.R.C.P. 56. *Small v. State*, 132 Idaho 327, 971 P.2d 1151 (Ct. App. 1998).

Summary dismissal of an application for post-conviction relief may be appropriate even where the state does not controvert the applicant's evidence, because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999).

A petition for post-conviction relief based on a claim of ineffective assistance of counsel will survive a motion for summary dismissal if the petitioner establishes that a material issue of fact exists as to whether counsel's performance was deficient, and that a material issue of fact exists as to whether the deficiency prejudiced petitioner's case. *Raudebaugh v. State*, 135 Idaho 602, 21 P.3d 924 (2001).

In defendant's murder case, a court did not err by summarily denying defendant's motion for postconviction relief where defendant's sentence was legal because the requirement that defendant's use of a firearm be specifi-

cally found was satisfied. *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

In defendant's murder case, a court did not err by summarily dismissing defendant's motion for postconviction relief where DNA evidence related only to what was a collateral issue at trial, and therefore, defendant failed to demonstrate that the newly discovered DNA evidence was material or that it would have probably produced an acquittal at a new trial. *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

—Preponderance of Evidence.

Summary dismissal of an application pursuant to this section is the procedural equivalent of summary judgment under I.R.C.P. 56 and like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

—Motion Denied.

The district court properly denied defendant's motion for summary disposition under this section where the conclusory allegations contained in defendant's application for post-conviction relief were insufficient to entitle him to a grant of summary disposition, and the state's failure to answer within the thirty-day period under (a) was moot where the factual and legal issues were properly framed before the district court prior to its ruling on the substantive merits of defendant's application. *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).

—Review.

On review of a summary dismissal of a post-conviction relief application, in assessing whether the trial court correctly found that there existed no genuine issue of material fact and that the state was entitled to judgment as a matter of law, the court does not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence; consequently, where a defendant alleged ineffective assistance of counsel in his post-conviction application, his attorney's responsive affidavit, which presented conclusory assertions as to the attorney's opinions and advice but no evidentiary tasks addressing the attorney's competence, was insufficient to support summary dismissal of defendant's application. *Remington v. State*, 127 Idaho 443, 901 P.2d 1344 (Ct. App. 1995).

In evaluating a post-conviction claim for summary disposition, the court assumes the truth of the applicant's allegations of fact.

Martinez v. State, 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).

Unverified Petition.

When a trial court receives an unverified petition, rather than dismissing the petition outright, sua sponte, it would be a better practice for the court to give notice of its intended dismissal, providing an opportunity for cure, as is required by subsection (b) of this section in the case of a petition for post-conviction relief. *Freeman v. State*, Dep't of Cors., 116 Idaho 985, 783 P.2d 324 (Ct. App. 1989).

Waiver.

A trial court may grant a motion by either party for summary disposition of an application for post conviction relief where it appears

from the pleadings that there is no genuine issue of material fact, however, where issues of material fact exist, an evidentiary hearing must be held. *Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990).

If petitioner believed that he was entitled to twenty days within which to respond to the state's motion to dismiss, he was required to raise that issue before the district court, and having failed to do so, he could not raise the issue on appeal. *Ferrier v. State*, 135 Idaho 797, 25 P.3d 110 (2001).

Defendant's failure to file, within 20 days, a responsive pleading to the trial court's proposed order dismissing his postconviction relief application waived any challenge to that order on appeal. *Repp v. State*, 136 Idaho 262, 32 P.3d 156 (Ct. App. 2001).

19-4907. Hearing — Evidence — Order — Presence of applicant.

— (a) The application shall be heard in, and before any judge of, the court in which the conviction took place. A record of the proceedings shall be made and preserved. All rules and statutes applicable in civil proceedings including pre-trial, discovery and appellate procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

(b) The applicant should be produced at the hearing on a motion attacking a sentence where there are substantial issues of fact as to evidence in which he participated. The sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing and requiring the applicant to be present. [1967, ch. 25, § 7, p. 42.]

Rule to sec. ref. This section is referred to in I.R.E., Rule 101.

Cited in: *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969); *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969); *Conner v. State*, 95 Idaho 413, 510 P.2d 308 (1973); *Cooper v. State*, 96 Idaho 542, 531 P.2d 1187 (1975); *Kraft v. State*, 99 Idaho 214, 579 P.2d 1197 (1978); *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct. App. 1983); *Wolfe v. State*, 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990); *Fox v. State*, 125 Idaho 672, 873 P.2d 926 (Ct. App. 1994); *Martinez v. State*, 125 Idaho 844, 875 P.2d 941 (Ct. App. 1994); *Smith v. State*, 126 Idaho 106, 878 P.2d 805 (Ct. App. 1994); *Tugmon v. State*, 127 Idaho 16, 896 P.2d 342 (Ct. App. 1995); *Fairchild v. State*, 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996); *Cootz v.*

State, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996); *LaBelle v. State*, 130 Idaho 115, 937 P.2d 427 (Ct. App. 1997); *Medina v. State*, 132 Idaho 722, 979 P.2d 124 (Ct. App. 1999); *Floyd v. State*, 135 Idaho 379, 17 P.3d 880 (Ct. App. 2000); *Matthews v. State*, 136 Idaho 46, 28 P.3d 387 (Ct. App. 2001); *Brown v. State*, 137 Idaho 529, 50 P.3d 1024 (Ct. App. 2002); *Goodwin v. State*, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002); *Garza v. State*, — Idaho —, — P.3d —, 2003 Ida. App. LEXIS 18 (Ct. App. Feb. 27, 2003); *Peterson v. State*, — Idaho —, 73 P.3d 108 (Ct. App. 2003). *Ida.*

ANALYSIS

Burden of proof.
Discretion of court.
Disqualification of judge.

Findings of fact.
Grounds for hearing.
In general.
Hearing.
—Judge.
Memorandum decision.
Nature of proceeding.
Necessity of findings.
Nici review.
Post conviction relief proceeding.
Presence of petitioner.
Purpose.
Relief denied.
Relief granted.
Scope of review.
Substantial claim.
Sufficiency of motion to dismiss.

Burden of Proof.

An applicant for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his petition is based. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

The petitioner had the burden of proving, by a preponderance of the evidence, the allegations which he contended entitled him to relief under the Post-Conviction Procedure Act. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988).

Applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995); *Stone v. State*, 132 Idaho 490, 975 P.2d 223 (Ct. App. 1999).

Discretion of Court.

In hearing for post-conviction relief, the petitioner's credibility, the weight to be given to his testimony and the inferences to be drawn from the evidence all were matters solely within the province of the trial court, and that the petitioner for post-conviction relief was the only witness to testify did not compel the court to find in his favor. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988).

Disqualification of Judge.

Where judge's stated reason for not honoring motion for disqualification, that he had been in the case from its inception, could only be understood as founded upon his view that the post-conviction proceeding was a continuation of the criminal action at which he had presided, he erred in continuing to preside in the post-conviction relief action. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), modified on other grounds, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

The judge's statements did not exhibit an improper predisposition which warranted dis-

qualification, where the judge's statements in the post-conviction relief hearing were essentially a restatement of the observations he had made on the record in the criminal case when the defendant sought to withdraw his pleas. Although the proceedings were separate, the judge was not required to totally disregard his earlier findings. *Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (Ct. App. 1988).

Where defendant made a motion under I.R.C.P. 40(d)(2)(A)(4) to disqualify the district judge appointed to defendant's post-conviction relief proceeding under § 19-4907(a), the grounds asserted by defendant, bias and appearance of impropriety, were without merit and there was no abuse of discretion in the district judge's denial of defendant's motion. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

Findings of Fact.

In a post-conviction relief proceeding the district court is required to make findings of fact and conclusions of law sufficient to provide a record for appellate review. However, findings are neither required nor possible where no evidence was presented upon which to base such a finding; thus, where defendant presented no evidence regarding his counsel's alleged failure to preserve and pursue defendant's Rule 35 rights, the district court did not err by failing to make any findings regarding that allegation. *State v. Jensen*, 126 Idaho 35, 878 P.2d 209 (Ct. App. 1994).

Grounds for Hearing.

To justify an evidentiary hearing in a post-conviction relief proceeding, it is incumbent upon the applicant to tender a factual based upon evidence that would be admissible at the hearing. His application must be supported by written statements from witnesses who are able to give testimony themselves as to facts within their knowledge, or must be based upon otherwise verifiable information and absent the witnesses or verifiability of the facts to which they could testify, the application fails to raise material issues of fact sufficient to justify an evidentiary hearing. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Post-conviction relief cannot be granted upon allegedly inadequate assistance of competent counsel where there is no evidence of prejudice resulting from the activity, or lack of activity, of counsel and bald and unsupported allegations regarding conferences with counsel and pretrial discovery, unsubstantiated by any proffered facts, are insufficient to entitle a defendant to an evidentiary hearing on his post-conviction application. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

Where, in a post-conviction proceeding, the defendant alleged that he was denied the

effective assistance of counsel but he made no factual showing that he was prejudiced either by the alleged infrequency of consultation with his counsel or by counsel's activities regarding pretrial discovery, no material issues of fact existed which would warrant an evidentiary hearing regarding frequency of conferences between the defendant and his counsel, or the extent and nature of counsel's pretrial discovery. *Drapeau v. State*, 103 Idaho 612, 651 P.2d 546 (Ct. App. 1982).

A trial court may grant a motion by either party for summary disposition of an application for post-conviction relief where it appears from the pleadings that there is no genuine issue of material fact, however, where issues of material fact exist, an evidentiary hearing must be held. *Parrott v. State*, 117 Idaho 272, 787 P.2d 258 (1990).

A trial court may grant a motion by either party for summary disposition of an application for post-conviction relief where it appears from the pleadings that no genuine issue of fact exists. However, where issues of material fact exist, an evidentiary hearing must be held. *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

To qualify for an evidentiary hearing, the applicant for post-conviction relief must tender a factual showing based on evidence admissible at the hearing that would entitle him to relief. Bare or conclusory allegations, unsubstantiated by any fact, are inadequate to entitle an applicant to an evidentiary hearing. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

In General.

Section 19-4906 provides the procedure by which a summary judgment may be entered in a proceeding under the act; however, such a summary disposition must be made only when there are no genuine issues of material fact. If an issue of material fact exists, then an evidentiary hearing must be held under this section. *State v. Goodrich*, 104 Idaho 469, 660 P.2d 934 (1983).

Where a hearing was conducted in which the parties stipulated to the record and presented oral arguments and the trial court made findings and conclusions, it must be concluded that the hearing and order dismissing the petition were pursuant to the procedures provided for in this section, and not the result of a summary dismissal under § 19-4906(c). *Deford v. State*, 105 Idaho 865, 673 P.2d 1059 (1983).

Rules of civil procedure are applicable in a post-conviction relief proceeding. *Campbell v. State*, 130 Idaho 546, 944 P.2d 143 (Ct. App. 1997).

Hearing.

—Judge.

Generally, application for post-conviction relief is heard by the same judge who issued

the judgment of conviction and sentence. This practice of having the sentencing judge also handle the post-conviction relief proceeding is approved by the Supreme Court absent a showing either of actual bias or prejudice on the part of that judge. *Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (Ct. App. 1988).

Memorandum Decision.

Where the petitioner had the burden to prove, by a preponderance of the evidence, the allegations on which his petition was based, the district court did not err by according little discussion to issues on which the petitioner presented no proof; thus, the district court's memorandum decision satisfied the requirements of subsection (a) of this section. *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985).

Nature of Proceeding.

An application for post-conviction relief is a special proceeding, civil in nature and is an entirely new proceeding, distinct from the criminal action which led to conviction. *State v. Bearshield*, 104 Idaho 676, 662 P.2d 548 (1983), modified on other grounds, *State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987).

An application for post-conviction relief under I.C. § 19-4901 is a special proceeding, distinct from the criminal action which led to the conviction, and if the application raises material issues of fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each such issue. *Sanchez v. State*, 127 Idaho 709, 905 P.2d 642 (Ct. App. 1995).

Summary dismissal of an application pursuant to § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56 and like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. *Chouinard v. State*, 127 Idaho 836, 907 P.2d 813 (Ct. App. 1995).

Necessity of Findings.

The trial court's denial of the application for post-conviction relief would be reversed, where the trial court's order did not address defendant's claim that he was denied effective assistance of counsel at trial, because the hearing provided for by the Uniform Post Conviction Relief Act contemplates the receipt of pleadings and evidence followed by findings of fact and conclusions of law, and without a specific statement by the trier of fact detailing what facts are found to be true, and what conclusions of law are reached, the Supreme Court is severely hampered in its assessment of defendant's appeal. *State v. Morris*, 101 Idaho 120, 609 P.2d 652 (1980).

The purpose behind the requirement in

subsection (a) of this section, that the trial court make specific findings of fact and expressly state its conclusions of law on each issue, is to afford the appellate court an adequate basis upon which to assess any appeal arising from the denial of a petition for post-conviction relief. *Maxfield v. State*, 108 Idaho 493, 700 P.2d 115 (Ct. App. 1985).

Under subsection (a) of this section, the absence of findings and conclusions may be disregarded by the appellate court only where the record is clear, and yields an obvious answer to the relevant question; the failure of the trial court to make specific findings and state its conclusions thus does not necessarily require reversal. *Maxfield v. State*, 108 Idaho 493, 700 P.2d 115 (Ct. App. 1985).

Where the trial court's oral ruling from the bench at the close of the hearing was transcribed for appeal and disclosed the court's findings and reasoning in reaching the ultimate conclusion of law that defendant had not established any ground for relief, this record was sufficient to conduct an appellate review of the issue and no reversible error occurred by the failure of the district court to enter its findings and conclusions in a more detailed, written form. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct. App. 1992).

NICI review.

Although it appeared that defendant had little time to prepare for his rebuttal hearing, that he was prevented from making the contacts that may have been necessary for adequate preparation, and that he was denied the opportunity to call witnesses from among the inmates and staff at the North Idaho Correctional Institute (NICI), the district court remedied any flaws that may have existed in this NICI review. Defendant was afforded full opportunity for rebuttal with assistance of counsel, use of the psychological report he desired to have considered, and the opportunity to call witnesses and prevent any relevant evidence. Therefore, denial of post-conviction relief petition was upheld. *Owen v. State*, 130 Idaho 715, 947 P.2d 388 (1997).

Post Conviction Relief Proceeding.

Where a court grants summary dismissal in a post-conviction relief proceeding pursuant to subsection (c) of § 19-4906 because it has determined as a matter of law that there are no issues of fact, there is no mandatory requirement that the court make specific findings of fact and conclusions of law as required by this section since no purpose would be served by requiring written findings and conclusions. *State v. Christensen*, 102 Idaho 487, 632 P.2d 676 (1981).

All rules and statutes applicable in civil cases are available to the parties in a post-conviction proceeding. *State v. Hairston*, 133 Idaho 496, 988 P.2d 1170 (1999), cert. denied,

529 U.S. 1134, 120 S. Ct. 2014, 146 L. Ed.2d 963 (2000).

Defendant failed to meet his burden of showing his counsel was ineffective for making a tactical decision not to pursue the issue of the extraterritorial arrest after determining the relevant statutes and researching significant case law and in determining that the arrest issue was not as pivotal as the search warrant issue even though the district court found that the officer was acting outside his jurisdiction and did not have extraterritorial authority pursuant to any exception in Idaho Code § 67-2337 when executing the arrest. *Laughlin v. State*, — Idaho —, 85 P.3d 1125 (Ct. App. 2003).

Presence of Petitioner.

Where court conducted evidentiary hearing in post-conviction relief proceeding, there was no requirement imposed by subsection (b) of this section that the petitioner had to be present at the hearing since the court determined that there were no material issues of fact, and subsection (b) requires the petitioner's presence only where there are substantial issues of fact regarding evidence in which petitioner participated. *State v. Christensen*, 102 Idaho 487, 632 P.2d 676 (1981).

A defendant's presence at a hearing on a petition for post-conviction relief is not required unless there exist substantial issues of fact as to evidence in which the defendant participated. *Lopez v. State*, 116 Idaho 705, 779 P.2d 19 (Ct. App. 1989).

Purpose.

The purpose behind the requirements specified in subsection (a) of this section is to afford the appellate court an adequate basis upon which to assess any appeal arising from the denial of an application for post-conviction relief, and failure to provide a record can result in reversal of the district court's denial of a defendant's application; however, the failure of a district court to make specific findings of fact or to state its conclusions of law upon denial of a petitioner's post-conviction claim does not necessarily require reversal, and the absence of such findings of fact or conclusions of law can be disregarded, but only if the record is clear and yields an obvious answer to the relevant questions raised on appeal. *Davis v. State*, 116 Idaho 401, 775 P.2d 1243 (Ct. App. 1989).

Relief Denied.

Where the defendant testified at length regarding his history of alcohol abuse, but he also revealed that he was able to control his alcoholism while he was incarcerated, and for a time while he was on parole, and admitted he had access to Alcoholics Anonymous meetings at the penitentiary but failed to attend or participate in that program, the court's deci-

sion that he did not establish that he was an alcoholic in need of specific treatment, for purposes of post-conviction relief, was not clearly erroneous. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988).

Defendant failed to show that his trial counsel's performance was deficient or that his counsel was ineffective in failing to provide any time and consultation regarding sentencing and sentencing procedures. *State v. Beorchia*, 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).

In defendant's murder case, a court did not err by summarily dismissing defendant's motion for postconviction relief where DNA evidence related only to what was a collateral issue at trial, and therefore, defendant failed to demonstrate that the newly discovered DNA evidence was material or that it would have probably produced an acquittal at a new trial. *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

In defendant's murder case, a court did not err by summarily denying defendant's motion for postconviction relief where defendant's sentence was legal because the requirement that defendant's use of a firearm be specifically found was satisfied. *State v. LePage*, 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003), cert. denied, — U.S. —, 124 S. Ct. 444, 157 L. Ed. 2d 321 (2003).

Relief Granted.

Where the defendant contended that he had been denied due process when his court-appointed trial attorney failed to appeal from the judgment of conviction, after the defendant had requested that an appeal be taken, the district court did not err in granting relief by vacating and then reimposing the judgment of conviction in order to accord the defendant a right to timely appeal from the conviction. *State v. Dillard*, 110 Idaho 834, 718 P.2d 1272 (Ct. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 283, 93 L. Ed. 2d 258 (1986).

Scope of Review.

Where there is competent and substantial evidence to support a decision made after an evidentiary hearing, on an application for post-conviction relief, that decision will not be disturbed on appeal. Regard shall be given to the special opportunity of the court to judge the credibility of those witnesses who appear personally before it; and the findings of fact of the court will not be set aside on appeal unless clearly erroneous. *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983).

On reviewing post-conviction applications, once the district court has denied or granted the application following a hearing as provided in this section, the evidence must be viewed most favorably to the trial court's

findings. *Reynolds v. State*, 126 Idaho 24, 878 P.2d 198 (Ct. App. 1994).

On reviewing the district court's granting or denying of post-conviction relief following an evidentiary hearing reviewing court considers the evidence in the light most favorable to the trial court's findings, and findings supported by competent and substantial evidence produced at the hearing will not be disturbed on appeal, although reviewing court will freely review the legal conclusions drawn by the trial court from the facts found. *Sanchez v. State*, 127 Idaho 709, 905 P.2d 642 (Ct. App. 1995).

It is not the appellate court's role, nor that of the trial court in a post-conviction relief action, to determine what the jury would have found, nor to make its own assessment of petitioner's guilt. The courts need only assess whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *Milburn v. State*, 130 Idaho 649, 946 P.2d 71 (Ct. App. 1997).

Substantial Claim.

The court was not required to grant the defendant a full evidentiary hearing on a post-conviction hearing that failed to allege facts entitling him to relief. *Walker v. State*, 92 Idaho 517, 446 P.2d 886 (1968).

Where the record before the post conviction court rebutting defendant's uncorroborated allegation of threats made against him to induce his guilty plea was overwhelming, and the trial court was given no reason to believe he would produce any new evidence, the trial court properly exercised its discretion under subsection (b) of this section and decided that the issue was not substantial; the district court did not abuse its discretion in holding that no substantial issue of fact existed and dismissing the petition without a full evidentiary hearing. *Deford v. State*, 105 Idaho 865, 673 P.2d 1059 (1983).

Sufficiency of Motion to Dismiss.

Trial court did not err in granting respondent's motion to dismiss the verified amended petition for post-conviction relief, though motion was unsupported by any affidavits or depositions contradicting the allegations of fact in the petition, where respondent, in his answer to the petition, explored the entire history of appellant's case both in the state and federal courts and referred to the entire state court's proceedings, and pleadings and exhibits in the federal district court. *Larsen v. May*, 93 Idaho 602, 468 P.2d 866 (1970).

Where defendant filed an application for post-conviction relief pursuant to subsection (a) of this section, the Court of Appeals held that such an action was a special proceeding

that was civil in nature and like a civil plaintiff, the defendant-applicant had to prove, by a preponderance of the evidence, the allegations upon which the request for relief was based and the application had to have pre-

sented or must have been accompanied by admissible evidence supporting its allegations, or the application would be subjected to dismissal under § 19-4903. *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995).

19-4908. Waiver of or failure to assert claims. — All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application. [1967, ch. 25, § 8, p. 42.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 25, compiled as §§ 19-4901 — 19-4911.

Cited in: *Pulver v. State*, 92 Idaho 627, 448 P.2d 241 (1968); *McClellan v. State*, 100 Idaho 682, 603 P.2d 1016 (1979); *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991); *Hoffman v. Arave*, 973 F. Supp. 1152 (D. Idaho 1997), rev'd on other grounds, 236 F.3d 523 (9th Cir. 2001); *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), cert. denied, 530 U.S. 1208, 120 S. Ct. 2207, 147 L. Ed. 2d 240 (2000).

ANALYSIS

Appeal.

Ineffective assistance of counsel.

Matters not included in application.

Prior adjudications.

Successive petitions.

Sufficient reason.

Timeliness.

Unsubstantiated allegations.

Waiver not shown.

Appeal.

Where a petitioner had raised the issue of competence of counsel on direct appeal, the petitioner could not again have the same matter considered further by the Supreme Court on appeal from the denial of a post-conviction application. *Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979).

The statutory constraint on presenting claims and issues in post-conviction proceedings is not as broad as the case law doctrine of *res judicata*. If the post-conviction application is grounded in the same facts and issues presented on appeal, summary dismissal is appropriate; however, post-conviction proceedings do not preclude claims or issues based upon facts beyond the record presented on appeal, if those facts could not, or customarily would not, have been developed in the trial on criminal charges. *Parsons v. State*,

113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Ineffective Assistance of Counsel.

A claim of ineffective assistance of counsel, in representing a petitioner in an initial application for post-conviction relief may not be raised as an issue in a subsequent or successive application for such relief. *Wolfe v. State*, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987).

In second application for post-conviction relief, defendant asserted that his counsel's conduct in not petitioning the Supreme Court for review of the Court of Appeals' opinion was ineffective assistance; defendant claimed that he was prejudiced by his counsel's failure to file a petition for the review from the Court of Appeals' opinion affirming the denial of his initial post-conviction application in that the prejudice he suffered was loss of opportunity to have his federal habeas corpus petition considered on its merits, rather than dismissed for failure to exhaust state remedies. Defendant's claim was not an appropriate ground for relief under § 19-4901 (a), for the post-conviction relief act is designed to deal with challenges to allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

One year was a reasonable time for an inmate to proceed with a successive post-conviction relief action if the initial action was dismissed due to ineffective assistance from the attorney representing the inmate in that proceeding. *Hernandez v. State*, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999).

Matters Not Included in Application.

In looking at application, court will presume regularity as to matters not alleged to have been irregular. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969).

An applicant for post-conviction relief should raise all issues and claims in the original application. While supplements and amendments to the original application are permissible, piece-meal applications are not favored and may invoke waiver and forfeiture provisions set forth in the Post-Conviction Procedure Act. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

An applicant for post-conviction relief should raise all issues and claims in the original application or an amended application. Any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition. *Lake v. State*, 126 Idaho 333, 882 P.2d 988 (Ct. App. 1994).

Prior Adjudications.

Appellant, convicted of escape and found to be a persistent violator of the law on the basis of a plea of guilty of escape and admissions made in open court to previous convictions, could not, in action for post-conviction relief, attack the validity of the admitted previous convictions. *Clark v. State*, 92 Idaho 827, 452 P.2d 54 (1969).

In second application for post-conviction relief, defendant's claim, that counsel who represented him through the entry of his guilty plea and sentencing, as well as the attorney appointed to represent him during the first post-conviction proceedings, had rendered ineffective assistance, that his trial counsel was ineffective on account of a language barrier between counsel and himself, and that counsel failed to point out errors in the presentence report, which led to an excessive sentence, failed where defendant's present counsel conceded that these issues relating to trial counsel's performance had been raised and adjudicated in the prior appeal. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

Successive Petitions.

Summary judgment under I.R.C.P. 56(c) was properly granted in favor of two clerks in an inmate's 42 U.S.C.S. § 1983 action because the inmate was unable to show an actual injury since the 1,800 pages of exhibits that he wanted to file but the clerks did not allow were unnecessary to the filing of the inmate's petition for post-conviction relief; moreover, the inmate did not establish that the petition in question was not frivolous because the petition was barred by the statute of limitations, and it was a successive petition. *Drennon v. Hales*, 138 Idaho 850, 70 P.3d 688 (Ct. App. 2003).

Sufficient Reason.

Although the intent of this section is that all allegations relating to a request for post-

conviction relief should be asserted in one petition, the language does not prohibit successive petitions for post-conviction relief in every case, but rather, only prohibits successive petitions in those cases where the petitioner "knowingly, voluntarily and intelligently" waived the grounds for which he now seeks relief, or offers no "sufficient reason" for the omission of those grounds in his "original, supplemental or amended petition"; accordingly it is necessary that the trial court find that the failure to include newly asserted grounds for relief in the prior post-conviction relief proceeding was without sufficient reason before the application may be summarily dismissed on the ground of waiver. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

All legal and factual grounds for relief must be raised in the first petition for post-conviction relief and any grounds for relief not raised are permanently waived if the grounds were known or should have been known at the time of the first petition, but where defendant did not know his conversations at jail were being monitored at the time of the first petition, the second petition was timely and proper. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990).

This section prohibits the filing of a second application for post-conviction relief unless the applicant shows sufficient reason why the issues could not have been raised in the prior application. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Although alleged ineffectiveness of counsel in a post-conviction proceeding may constitute sufficient reason for allowing the filing of a second application under this section, it does not constitute an independent basis for post-conviction relief. *Dunlap v. State*, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995).

Subsequent petitions for post-conviction relief are allowed if the applicant states a sufficient reason for not asserting the grounds in the earlier petition; however, if the applicant does not meet his burden of providing the district court with factual reasons upon which the court could conclude that there was a "sufficient reason" why the grounds for relief asserted in the second petition were not asserted in the earlier application, the subsequent application for relief must be dismissed. *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995).

Timeliness.

Where defendant filed his pro se motion for leave to file a successive post-conviction application along with the successive application less than one year after the Supreme Court's determination of the appeal in the initial post-conviction proceeding, summary dismissal of defendant's successive post-conviction application solely on the ground that it

was time barred was error. *Hernandez v. State*, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999).

Unsubstantiated Allegations.

A conclusory allegation, unsubstantiated by any fact, is insufficient to entitle a petitioner to an evidentiary hearing, therefore, where, in a second application for post-conviction relief, there were no affidavits, records or other evidence offered, the conclusory allegations were not substantiated as required by the statute; and, insofar as the application was dismissed for failure to provide sufficient reason to show why the grounds alleged in that application were not raised in the first application, the district court's determination was correct. *King v. State*, 114 Idaho 442, 757 P.2d 705 (Ct. App. 1988).

Where defendant's second application for post-conviction relief was drafted pro-se and was not amended or supplemented once counsel was appointed to represent him, the allegations asserted therein, without supporting affidavits based upon otherwise verifiable information, could not be a basis for post-conviction relief. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

In second petition for post-conviction relief

where defendant's allegations regarding an unlawful arrest and an illegally obtained confession were raised for the first time in the second application, but his allegations were conclusory and asserted no facts indicating that counsel in first post-conviction knew of, but failed to raise before the trial court, such alleged defects, defendant presented no evidence that his counsel on the first application was deficient in failing to raise such claims. *Nguyen v. State*, 126 Idaho 494, 887 P.2d 39 (1994).

Waiver Not Shown.

Where an applicant for post-conviction relief failed to raise the issue of ineffectiveness of trial counsel on prior request for post-conviction relief because his court-appointed attorney removed the issue from the applicant's original prose petition without the applicant's knowledge or consent, and the state did not contravene the newly asserted allegations on a petition for habeas corpus, the district court erred in dismissing the petition for relief without granting an evidentiary hearing going to the merits of the allegations. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

19-4909. Review. — A final judgment entered under this act may be reviewed by the Supreme Court of this state on appeal brought either by the applicant or by the state within forty-two (42) days from the entry of the judgment. On appeal the state shall be represented by the attorney general. [1967, ch. 25, § 9, p. 42; am. 1985, ch. 75, § 1, p. 150.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 25, compiled as §§ 19-4901 — 19-4911.

Section 2 of S.L. 1985, ch. 75 read: "This act shall be in full force and effect on and after July 1, 1985 and shall apply to all final judgments entered under the Uniform Post Conviction Procedure Act after July 1, 1985."

ANALYSIS

Appealable order.

Habeas corpus.

Timeliness of filing appeal.

Appealable Order.

Until a district court has acted upon a magistrate's decision the judgment is not subject to higher appellate review. *Parsons v. State*, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987), cert. denied, 116 Idaho 466, 776 P.2d 828 (1988).

Habeas Corpus.

While the writ of habeas corpus is recognized in the Const., Art. 1, § 5, the post-conviction relief statute has been construed as "an expansion," not a limitation, on the

writ of habeas corpus; therefore when a petitioner is challenging the validity of his conviction, the Idaho courts require use of the post-conviction petition and will not allow a proceeding in habeas corpus to raise those issues; therefore, the writ of habeas corpus remains for such issues as challenging the conditions of a prisoner's confinement, but not for contesting a conviction. *McKinney v. Paskett*, 753 F. Supp. 861 (D. Idaho 1990).

Timeliness of Filing Appeal.

Where the defendant filed his notice of appeal from the trial court's order denying post-conviction relief 49 days after the filing of the court's order, such filing was timely under the former provisions of this section, which allowed 60 days for filing, although untimely under I.A.R. 14, which allows 42 days for filing and because these filing provisions were inconsistent at the time of this filing, dismissal of the appeal was not required. *Carter v. State*, 108 Idaho 788, 702 P.2d 826 (1985) (decision prior to 1985 amendment).

Where the defendant filed his notice of appeal 59 days after the judgment, the notice

was within the 60-day filing requirement of this section, but not within the 42-day requirement of IAR 14; however, in the interest of justice and because of the conflict between

the rule and this section, the appeal was not dismissed. *Baruth v. Gardner*, 110 Idaho 156, 715 P.2d 369 (Ct. App. 1986) (decision prior to 1985 amendment).

19-4910. Uniformity of interpretation. — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1967, ch. 25, § 10, p. 42.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 25, compiled as §§ 19-4901 — 19-4911.

19-4911. Short title. — This act may be cited as the Uniform Post-Conviction Procedure Act. [1967, ch. 25, § 11, p. 42.]

Compiler's notes. The words "this act" refer to S.L. 1967, ch. 25, compiled as §§ 19-4901 — 19-4911.

Section 12 of S.L. 1967, ch. 25 read: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions

or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Cited in: *Nellsch v. State*, 122 Idaho 426, 835 P.2d 661 (Ct. App. 1992).

CHAPTER 50

INTERSTATE AGREEMENT ON DETAINERS

SECTION.

- 19-5001. Text of agreement.
- 19-5002. Appropriate court — Defined.
- 19-5003. Cooperation of officials.
- 19-5004. Persistent violators.
- 19-5005. Escape from custody obtained pur-

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- suant to request for final disposition — Effect.
- 19-5006. Mandatory delivery of custody.
- 19-5007. Administration.
- 19-5008. Distribution of copies of act.

19-5001. Text of agreement. — The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

(a) The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

(b) As used in this agreement:

(1) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(2) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to subsection (c) of this section or at the time that a request for custody or availability is initiated pursuant to subsection (d) of this section.

(3) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to subsections (c) and (d) of this section.

(c)(1) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(2) The written notice and request for final disposition referred to in paragraph (1) of this subsection shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(3) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(4) Any request for final disposition made by a prisoner pursuant to paragraph (1) of this subsection shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on

any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(5) Any request for final disposition made by a prisoner pursuant to paragraph (1) of this subsection shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (4) of this subsection, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(d)(1) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with subsection (e) (1) of this section upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(2) Upon receipt of the officer's written request as provided in paragraph (1) of this subsection, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainees against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(3) In respect of any proceeding made possible by this paragraph, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(4) Nothing contained in this act shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (1) of this subsection, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(5) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to subsection (e) (5) of this section, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e)(1) In response to a request made under subsections (c) or (d) of this section, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in subsection (c) of this section. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(2) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(A) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(B) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(3) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in subsections (c) or (d) of this section, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(4) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one (1) or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(5) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(6) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(7) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(8) From the time that a party state receiving custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one (1) or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payments of costs, or responsibilities therefor.

(f)(1) In determining the duration and expiration dates of the time periods provided in subsections (c) and (d) of this section, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(2) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

(g) Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

(h) This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

(i) This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the

applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the state affected as to all severable matters. [1971, ch. 167, § 1, p. 790.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 167 which is compiled as §§ 19-5001 — 19-5008.

Comp. leg. Wash. Rev. Code, §§ 9.100-010 — 9.100-080.

Wyo. Stat. §§ 7-15-101 — 7-15-107.

Cited in: State v. Jaramillo, 113 Idaho 862, 749 P.2d 1 (Ct. App. 1987).

ANALYSIS

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Where this section was never "triggered" by a detainer, its provisions — including the time to commence a trial — were inapplicable to the defendant. State v. Smith, 119 Idaho 11, 802 P.2d 1223 (Ct. App. 1990).

The Interstate Agreement on Detainers Act does not apply to warrants or detainers asserting claims of alleged violation of probation. Swain v. State, 122 Idaho 918, 841 P.2d 448 (Ct. App. 1992).

After an individual pleads guilty, there is no longer an untried indictment, information or complaint for the district court to dismiss, and by its plain language, this section applies only to an untried indictment, information or complaint, and not to sentencing detainers. State v. Miller, 134 Idaho 458, 4 P.3d 570 (Ct. App. 2000).

Burden of Proof.

The burden to establish "good cause" for delay of the trial of the prisoner is on the state, just as the primary responsibility for bringing a case to trial is upon the state. State v. Knauff, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988).

Concurrent Sentences.

The contention that delay by this state effectively eliminated any possibility of the defendant's prison terms in this state and another state running concurrently and resulting in his gaining release without having to transfer to this state to finish, or to receive parole on, the remaining sentence in this state was without merit, as concurrency of sentences is controlled by statute and is not constitutionally required. State v. Moliga, 113 Idaho 672, 747 P.2d 81 (Ct. App. 1987).

Credit for Confinement.

In sentencing, the district court properly allowed credit only for time the defendant served in confinement related to charges in this state and not for time he served in another state on other charges. State v. Moliga, 113 Idaho 672, 747 P.2d 81 (Ct. App. 1987).

During the time defendants served in the temporary custody of county, they were not denied their liberty because although they were awaiting disposition of state bombing charges, their liberty already had been denied by the federal courts by virtue of the federal sentences imposed on them; therefore, they were not entitled to credit on their state sentences for the time they served in temporary custody. State v. Dorr, 120 Idaho 441, 816 P.2d 998 (Ct. App. 1991).

Defendant's post-sentence incarceration in county jail, due to space considerations, prior to transfer to state prison, precluded the application of the Interstate Agreement on Detainers (IAD) during that time period, including speedy trial provisions of this section, as the time a defendant spends in custody after sentencing, but before he has been taken to the correctional facility in which he will serve his sentence, is not covered by IAD time limits. Brewer v. State, 128 Idaho 340, 913 P.2d 73 (Ct. App. 1996).

Definition of Detainer.

Even though Washington state corrections officials had knowledge of Idaho's interest in prosecuting the prisoner at the time they took possession of him from Oregon, such knowledge could not be said to constitute a "detainer." State v. Bronkema, 109 Idaho 211, 706 P.2d 100 (Ct. App. 1985).

A telephone call from an unidentified offi-

cial at the Washington State Department of Corrections to a county sheriff's office in Idaho stating that the prisoner was in their custody and that they were aware of Idaho's interest in him was not a "detainer." *State v. Bronkema*, 109 Idaho 211, 706 P.2d 100 (Ct. App. 1985).

The term "detainer" entails some form of written communication initiated by the receiving state which is filed or lodged with the custodial or sending state, requesting the sending state to notify the receiving state of the prisoner's imminent release from custody or to hold the prisoner after his release for the receiving state; the requirement that the detainer be a written document furthers the stated purpose of the Interstate Agreement on Detainers. *State v. Bronkema*, 109 Idaho 211, 706 P.2d 100 (Ct. App. 1985).

Discretion of Court.

The determination of "good cause" for a delay of trial is initially a matter for the discretion of the trial court; good cause for delay is determined upon the facts and circumstances of each case. *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988).

Dismissal of Charges.

Where Oregon's extradition warrant and defendant's request for extradition were treated as a detainer, the Oregon charges could not be dismissed by the Idaho court because Idaho courts have no general authority to dismiss criminal charges filed in other states and such authority is not granted by subdivision (e)(3) of this section. *Pyzer v. State*, 109 Idaho 376, 707 P.2d 487 (Ct. App. 1985).

The detainer statute contemplates expeditious disposition of charges against individuals within the specified time limitations. If the state fails to meet those requirements, the outstanding charge against the prisoner should be dismissed. *State v. Moliga*, 113 Idaho 672, 747 P.2d 81 (Ct. App. 1987).

Absent a showing of "good cause" for the delay of the trial of the prisoner, denial of the right to have the trial within the mandatory time requirements results in dismissal of the action. *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988).

Court properly denied defendant's motion to dismiss for violation of the act where he had several cases pending in different counties which were tried first, and he was brought to trial within a reasonable time. *State v. Peterson*, 137 Idaho 255, 47 P.3d 378 (Ct. App. 2002).

Eligibility of Prisoner.

The district court did not err in concluding the defendant was not eligible to assert rights under the Interstate Agreement on Detainers (I.A.D.) because he was incarcerated as a

pretrial detainee in an Idaho county jail rather than in a penal institution, even though he was also concurrently serving an existing sentence, due to the revocation of his parole from a prior conviction in Washington. *State v. Breen*, 126 Idaho 305, 882 P.2d 472 (Ct. App. 1994).

Good Cause for Delay.

Where the state argued that the trial delay was necessary for adequate preparation of the action and to alleviate an overcrowded trial schedule, the state did not prove "good cause" for a continuance. *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988).

Where there was no evidence in the record showing the filing of a detainer in Wyoming by any Idaho authority and the defendant filed a request to be returned to Idaho for trial, the provisions of the detainer statute were never triggered; but even if a detainer had been lodged, good cause for any delay in bringing the defendant to trial was largely caused by the defendant himself by his request for number of continuances. *State v. Smith*, 119 Idaho 96, 803 P.2d 1002 (Ct. App. 1990).

Guilty Plea.

—Waiver of Compliance.

Defendant waived any deficiency in the state's compliance with this section by subsequently entering a plea of guilty. *Sherman v. State*, 107 Idaho 869, 693 P.2d 1071 (Ct. App. 1984).

Since the nonjurisdictional defect or defense of the state's failure to bring defendant to trial within 180 days as required by subdivision (c)(1) of this section was waived by defendant's guilty plea, it matters not whether the defects or defenses were asserted "in prior proceedings" or in a separate or subsequent proceeding. *Sherman v. State*, 107 Idaho 869, 693 P.2d 1071 (Ct. App. 1984).

Purpose.

Guarantees in this section were to prevent abuse of detainers and undue incarceration, and to limit the possibility that a long delay would impair the ability of a prisoner to defend himself. *State v. Knauff*, 115 Idaho 74, 764 P.2d 441 (Ct. App. 1988).

Request for Final Disposition.

A prisoner's demand for a final disposition is inoperative with regard to the 180-day speedy trial provision absent the lodging of a detainer against him; the speedy disposition demand is effective only as to any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, under subdivision (c)(1) of this section. *State v. Bronkema*, 109 Idaho 211, 706 P.2d 100 (Ct. App. 1985).

Where a defendant has made no demand

for trial, any prejudice arising from the lengthy duration of unresolved charges is not due to the "detainer" but instead is due to defendant's failure to avail himself of the means for obtaining resolution of those charges. *Pyzer v. State*, 109 Idaho 376, 707 P.2d 487 (Ct. App. 1985).

Time Limitations.

Appellant, whose application for postconviction relief was partially granted, failed to show that sentencing counsel performed deficiently by not preserving for appellate review the issue of the State's alleged violation of the Interstate Agreement on Detainers (IAD) by not bringing appellant to trial within the 180-day time limit; appellant did not properly invoke the speedy trial provision of the IAD. *Peterson v. State*, — Idaho —, 73 P.3d 108 (Ct. App. 2003).

Transfer Under Fraudulent Documents.

A transfer of a prisoner to the custody of another state for prosecution under allegedly fraudulent detainer documents in violation of the Interstate Agreement on Detainers is not a ground for post-conviction relief under subsection (a) of § 19-4901. *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981).

Collateral References. Validity, construction and application of Interstate Agreement on Detainers. 98 A.L.R.3d 160.

Availability of postconviction relief under 28 USCS § 2255 based on alleged governmental violation of the Interstate Agreement on Detainers Act (18 USCS Appx.) 58 A.L.R. Fed. 443.

19-5002. Appropriate court — Defined. — The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean the state district courts. [1971, ch. 167, § 2, p. 790.]

19-5003. Cooperation of officials. — All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose. [1971, ch. 167, § 3, p. 790.]

19-5004. Persistent violators. — Nothing in this act or in the agreement on detainers shall be construed to require the application of section 19-2514, Idaho Code, to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement. [1971, ch. 167, § 4, p. 790.]

19-5005. Escape from custody obtained pursuant to request for final disposition — Effect. — Escape from custody while in another state pursuant to the agreement on detainers and escape from custody in this state by any prisoner subsequent to his execution of a request for final disposition of an untried indictment, information or complaint voids the request. [1971, ch. 167, § 5, p. 790.]

19-5006. Mandatory delivery of custody. — It shall be lawful and mandatory upon the director of correction in charge of the Idaho state prison to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers. [1971, ch. 167, § 6, p. 790.]

19-5007. Administration. — The director of correction shall serve as central administrator of, and information agent for, the agreement on detainers. [1971, ch. 167, § 7, p. 790.]

19-5008. Distribution of copies of act. — Copies of this act shall, upon its approval, be transmitted to the governor of each state, the attorney general and the administrator of general services of the United States, and the council of state governments. [1971, ch. 167, § 8, p. 790.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 167 which is compiled as §§ 19-5001 — 19-5008.

Section 9 of S.L. 1971, ch. 167 repealed the Uniform Mandatory Disposition of Detainers

Act, comprising S.L. 1969, ch. 415, p. 1150, which was formerly compiled as §§ 19-5001 — 19-5008.

Section 10 of S.L. 1971, ch. 167 declared an emergency. Approved March 10, 1971.

CHAPTER 51

PEACE OFFICER STANDARDS AND TRAINING COUNCIL

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- 19-5104. Council — Expiration of term — Vacancies — Additional terms.
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- 19-5109. Powers of the council — Standards of training, education and employment of peace officers — Certification — Penalties.
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- 19-5111. Application for training — Approval by council.
- 19-5112. Agreement by officer to serve — Violations.
- 19-5113. Investigations — Authority to administer oaths — Subpoenas.
- 19-5114. Annual reports.
- 19-5115. Reimbursement for expenses.
- 19-5116. Peace officers standards and training fund.
- 19-5117. Powers of the council — Standards of training, education and employment of county detention officers — Certification — Penalties.
- 19-5118 — 19-5122. [Repealed.]

19-5101. Definitions. — As used in this act:

(a) "Council" means the Idaho peace officer standards and training council.

(b) "County detention officer" means an employee in a county jail who is responsible for the safety, care, protection, and monitoring of county jail inmates.

(c) "Law enforcement" means any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency.

(d) "Peace officer" means any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. "Peace officer" also means an employee of a police or law enforcement agency of a federally recognized Indian tribe who has satisfactorily completed the peace officer standards and training academy and has been deputized by a sheriff of a county or a chief of police of a city of the state of Idaho.

(e) "Political subdivision" means any city or county. [I.C., § 19-5101, as added by 1981, ch. 307, § 2, p. 629; am. 1992, ch. 248, § 1, p. 730; am. 1997, ch. 84, § 1, p. 199.]

Compiler's notes. Former §§ 19-5101 — 19-5115 (1969, ch. 415, §§ 1-15, p. 1150; 1972, ch. 279, §§ 1, 2, p. 687; 1973, ch. 172, §§ 1, 2, p. 362; 1974, ch. 22, §§ 17, 18, p. 592; 1974, ch. 89, § 1, p. 1185; 1975, ch. 159, §§ 1-4, p. 410; 1977, ch. 186, § 1, p. 518; 1979, ch. 113, § 1, p. 357; 1980, ch. 144, § 1, p. 309; 1980, ch. 247, § 3, p. 587) were repealed by S.L. 1981, ch. 307, § 1.

The words "this act" refer to S.L. 1981, ch. 307, which is compiled as §§ 19-5101 — 19-5115.

Section 2 of S.L. 1992, ch. 248 is compiled as § 19-5109.

Section 2 of S.L. 1997, ch. 84 is compiled as § 19-5109.

Sec. to sec. ref. This chapter is referred to in §§ 6-610, 59-1302, 67-5309.

This section is referred to in §§ 19-5109, 49-117 and 67-5309.

Cited in: State v. Gage, 123 Idaho 875, 853 P.2d 620 (Ct. App. 1993).

Application.

Neither § 19-5101 nor this section applies to the relevant terms enumerated in § 18-4003(b). State v. Pratt, 125 Idaho 546, 873 P.2d 800 (1993).

Opinions of Attorney General. A court cannot simply appoint someone and call him or her a "marshal," thereby conferring peace officer status and enabling the person to carry a concealed weapon, serve arrest warrants, take custody of prisoners and secure courtrooms; however, if the sheriff cooperates with the court, a marshal could be authorized to

perform all the sheriff's court attendance duties, after being deputized by the sheriff. OAG 87-3.

It is the duty of the county sheriff to attend all courts located within his or her county. OAG 87-3.

Former § 31-3010 was not valid statutory authority for the appointment of special constables to serve as court attendants; the duties of court attendants, formerly split between sheriffs and constables, now rest solely with sheriffs, and if there are no constables, there can be no special constables to perform constable duties. Thus, in the few counties where "special constables" have been appointed to attend the court, they are acting without statutory authority, unless deputized by the sheriff or justified by exigent circumstances. OAG 87-3.

The office of constable is defunct, and the duty of attending court is now statutorily assigned to the sheriff; with the sheriff charged with these duties, the courts had no implied power under former § 31-3002 to appoint constables to attend to magistrate's courts. OAG 87-3.

The staff personnel provided by the county or city are not given specific statutory authorization to perform any of the functions of court attendants, nor are they recognized as peace officers; thus, they are not competent to perform the full range of security functions of court attendants. OAG 87-3.

There is no statutory authority for court appointment of bailiffs as court attendants. OAG 87-3.

19-5102. Council established — Chairman — Members. — There is hereby established in the Idaho state police the Idaho peace officer standards and training council. The chairman of the council shall be appointed by the governor and shall be a voting member of the council which shall be composed of the following members, and which shall reflect a reasonable geographic balance throughout the state:

- (a) Three (3) city chiefs of police or their designees;
 - (b) Three (3) county sheriffs or their designees;
 - (c) The director of the Idaho state police or his designee;
 - (d) A county prosecuting attorney or his designee;
 - (e) The attorney general or his designee;
 - (f) The special agent in charge of the Idaho division of the federal bureau of investigation or his designee;
 - (g) The director of the department of correction or his designee;
 - (h) The director of the fish and game department or his designee;
 - (i) The director of the department of juvenile corrections or his designee;
- and

(j) In addition, there shall be advisory to the council, as ex officio nonvoting members of the council, the executive directors of the Idaho association of counties and association of Idaho cities. [I.C., § 19-5102, as added by 1981, ch. 307, § 2, p. 629; am. 1990, ch. 308, § 1, p. 848; am. 1999, ch. 154, § 1, p. 428; am. 2000, ch. 469, § 36, p. 1450.]

Compiler's notes. Former § 19-5102 was repealed. See Compiler's notes, § 19-5101.
Section 2 of S.L. 1999, ch. 154 is compiled as § 19-5109.

Sections 35 and 37 of S.L. 2000, ch. 469 are compiled as §§ 18-8408 and 19-5109, respectively.

19-5103. Council — Terms of office. — Council members not serving by virtue of their office shall be appointed for four (4) year terms initially staggered as specified by the governor. [I.C., § 19-5103, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5103 was repealed. See Compiler's notes, § 19-5101.

19-5104. Council — Expiration of term — Vacancies — Additional terms. — No member shall serve beyond the time when he holds the office or employment by reason of which he was initially eligible for appointment and any member chosen to fill a vacancy created otherwise than by expiration of term shall be appointed for the unexpired portion of the term of the member whom he succeeds. Any member may be appointed for additional terms. [I.C., § 19-5104, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5104 was repealed. See Compiler's notes, § 19-5101.

19-5105. Chairman — Vice-chairman. — The governor shall appoint a chairman, and the council annually shall elect a vice-chairman from among the membership. [I.C., § 19-5105, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5105 was repealed. See Compiler's notes, § 19-5101.

19-5106. Membership no disqualification for other public office. — Notwithstanding any provision of any statute, ordinance, local law or charter provision to the contrary, membership on the commission shall not disqualify any member from holding any other public office or cause the forfeiture thereof. [I.C., § 19-5106, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5106 was repealed. See Compiler's notes, § 19-5101.

19-5107. Rules and regulations. — The council shall promulgate, amend and rescind such rules and regulations in accordance with the provisions of chapter 52, title 67, Idaho Code, it deems necessary to carry out the provisions of this chapter. [I.C., § 19-5107, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5107 was repealed. See Compiler's notes, § 19-5101.

19-5108. Meetings — Quorum — Votes — Advisory and ex officio members. — The council shall meet a minimum of once each calendar year and more often at the call of the chairman. The presence of a majority of the voting members of the council shall constitute a quorum for doing business. Advisory and ex officio members shall be entitled to participate in the business and deliberation of the council, but shall not be entitled to vote. The council shall establish its own procedures and requirements with respect to place and conduct of its meetings. [I.C., § 19-5108, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5108 was repealed. See Compiler's notes, § 19-5101.

19-5109. Powers of the council — Standards of training, education and employment of peace officers — Certification — Penalties.

— (a) It shall be the duty of and the council shall have the power:

(1) To establish the requirements of minimum basic training which peace officers shall complete in order to be eligible for permanent employment as peace officers, and the time within which such basic training must be completed. One (1) component of minimum basic training shall be a course in the investigation of and collection of evidence in cases involving an allegation of sexual assault or battery.

(2) To establish the requirements of minimum education and training standards for employment as a peace officer in probationary, temporary, part-time, and/or emergency positions.

(3) To establish the length of time a peace officer may serve in a probationary, temporary, and/or emergency position.

(4) To approve, deny approval or revoke the approval of any institution or school established by the state or any political subdivision or any other party for the training of peace officers.

(5) To establish the minimum requirements of courses of study, attendance, equipment, facilities of all approved schools, and the scholastic requirement, experience and training of instructors at all approved schools.

(6) To establish such other requirements for employment, retention and promotion of peace officers, including minimum age, physical and mental standards, citizenship, moral character, experience and such other matters as relate to the competence and reliability of peace officers.

(7) To certify peace officers as having completed all requirements established by the council in order to be eligible for permanent employment as peace officers in this state.

(8) To receive and file for record copies of merit regulations or local ordinances passed by any political subdivision.

(9) To maintain permanent files and transcripts for all peace officers certified by the council to include any additional courses or advance

courses of instruction successfully completed by such peace officers while employed in this state.

(10) To receive applications for financial assistance from the state and from political subdivisions and disburse available state funds to the state and to political subdivisions for salaries and allowable living expenses or any part thereof, as authorized by the council, incurred while in attendance at approved training programs and schools. The annual reimbursements authorized by this section shall not exceed the funds available for such purpose and authorized by section 31-3201B, Idaho Code.

(11) To allow a peace officer of a federally recognized Indian tribe within the boundaries of this state to attend the peace officer standards and training academy if said peace officer meets minimum physical and educational requirements of the academy. The Indian tribal law enforcement agency shall reimburse the peace officer standards and training academy for the officer's training. Upon satisfactory completion of the peace officer standards and training academy, the tribal peace officer shall receive a certificate of satisfactorily completing the academy.

(b) After January 1, 1974, any peace officer as defined in section 19-5101(d), Idaho Code, employed after January 1, 1974, except any elected official or deputy serving civil process, the deputy director of the Idaho state police, or any person serving under a temporary commission with any law enforcement agency in times of natural or man-caused disaster declared to be an emergency by the board of county commissioners or by the governor of the state of Idaho, or those peace officers whose primary duties involve motor vehicle parking and animal control pursuant to city or county ordinance, or any peace officer acting under a special deputy commission from the Idaho state police, shall be certified by the council within one (1) year of employment; provided, however, that the council may establish criteria different than that required of other peace officers for certification of city police chiefs or administrators within state agencies having law enforcement powers, who, because of the number of full-time peace officers they supervise, have duties which are primarily administrative. Any such chief of police or state agency administrator employed in such capacity prior to July 1, 1987, shall be exempt from certification.

(c) No peace officer shall have or exercise any power granted by any statute of this state to peace officers unless such person shall have been certified by the council within one (1) year of the date upon which such person commenced employment as a peace officer, except in cases where the council, for good cause and in writing, has granted additional time to complete such training. The council may decertify any officer who pleads guilty or is found guilty, regardless of the form of judgment or withheld judgment of:

(1) Any felony or offense which would be a felony if committed in this state;

(2) Any misdemeanor;

(3) Any unlawful use, possession, sale or delivery of any controlled substance; or who

(4) Willfully or otherwise falsifies or omits any information to obtain any certified status; or who

(5) Violates any of the standards of conduct as established by the council's code of ethics, as adopted and amended by the council.

All proceedings taken by the council shall be done in accordance with chapter 52, title 67, Idaho Code.

(d) Any law enforcement agency as defined in section 19-5101(c), Idaho Code, in which any peace officer shall resign as a result of any disciplinary action or in which a peace officer's employment is terminated as a result of any disciplinary action, shall, within thirty (30) days of such action, make a report to the council.

(e) The council shall, pursuant to the requirements of this section, establish minimum basic training and certification standards for county detention officers that can be completed within one (1) year of employment as a county detention officer.

(f) The council may, upon recommendation of the juvenile training council and pursuant to the requirements of this section, implement minimum basic training and certification standards for juvenile detention officers and for juvenile probation officers. [I.C., § 19-5109, as added by 1981, ch. 307, § 2, p. 629; am. 1987, ch. 180, § 1, p. 356; am. 1992, ch. 248, § 2, p. 730; am. 1997, ch. 84, § 2, p. 199; am. 1997, ch. 234, § 1, p. 683; am. 1999, ch. 154, § 2, p. 428; am. 2000, ch. 113, § 1, p. 250; am. 2000, ch. 469, § 37, p. 1450; am. 2001, ch. 143, § 1, p. 510; am. 2002, ch. 84, § 1, p. 187.]

Compiler's notes. This section was amended by two 1997 acts — ch. 84, § 2, effective March 13, 1997 and ch. 234, § 1, effective July 1, 1997 — which appear to be compatible and have been compiled together.

The amendment by ch. 89, § 2 added subsection (e).

The amendment by ch. 234, § 2 in subsection (c) in the second sentence following "The council" substituted "may decertify any officer who pleads guilty or is found guilty, regardless of the form of judgment or withheld judgment of:" and paragraphs (1) — (5) for "shall also have the power to withdraw the certification of any peace officer who is convicted or found guilty of any crime punishable by one (1) year in the county jail or any term of imprisonment in the state prison, or who is convicted of any crime of dishonesty".

This section was amended by two 2000 acts — ch. 113, § 1 and ch. 469, § 37, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 113, § 1, substituted "or deputy serving civil process" for "any deputy sheriff working as a detention officer in the county jail or serving civil process" in subsection (b).

The 2000 amendment by ch. 469, § 37, in subsection (b), substituted "deputy director" for "superintendent" and "Idaho state police" for "department of law enforcement".

Section 1 of S.L. 1992, ch. 248 is compiled as § 19-5101.

Sections 1 and 3 of S.L. 1997, ch. 84 are

compiled as §§ 19-5101 and 19-5116, respectively.

Section 1 of S.L. 1999, ch. 154 is compiled as § 19-5102.

Sections 36 and 38 of S.L. 2000, ch. 469 are compiled as §§ 19-5102 and 19-5113, respectively.

Section 5 of S.L. 1997, ch. 84 declared an emergency. Approved March 13, 1997.

Sec. to sec. ref. This section is referred to in §§ 19-5111 and 19-5112.

Opinions of Attorney General. A sheriff does not have the power to retain a deputy with full peace officer powers beyond one year of such deputy's full-time employment without the deputy becoming trained and certified by peace officers standards and training council; to disregard subsection (b) of this section requiring certification would be unlawful in view of the deleterious consequences, civil and criminal, which may affect the individual "officer," the sheriff, the county commissioners and the residents of said county. OAG 87-1.

The Director of Law Enforcement is the appointing authority for the staff of the POST Academy, since the POST Council is created within the department and has no specific authority to hire and fire employees. Therefore, the director is the appointing authority by operation of § 67-2405. OAG 90-5.

Certification Requirement.

Where a peace officer who procured and executed search warrant on defendant's residence was not yet certified by the Idaho Police

Officers Standards Training Council (POST) under subsection (c) of this section at the time defendant's residence was searched, subsection (b) of this section required only that a peace officer be certified within one year of employment, defendant's contention that the officer was not permitted to exercise the powers conferred on a peace officer as she had not

certified with POST at the time defendant's residence was searched was unsupported by the record which showed that the officer was certified within one year of her starting date of employment as a peace officer in conformity with this section. *State v. Wengren*, 126 Idaho 662, 889 P.2d 96 (Ct. App. 1995).

19-5110. Political subdivisions — Application for aid — Requirements. — Any political subdivision or state agency which desires to receive aid pursuant to this chapter shall make application upon a form supplied by the council. Applications submitted pursuant to section 19-5109, Idaho Code, shall be accompanied by a certified copy of an ordinance adopted by its governing body providing that, while receiving any aid pursuant to this act, such political subdivision will adhere to the standards for recruitment and training established by the council or a certified copy of the agency's or political subdivision's merit rules, regulations or requirements. [I.C., § 19-5110, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5110 was repealed. See Compiler's notes, § 19-5101.

19-5111. Application for training — Approval by council. — The council shall be the exclusive body for the approval of applications to attend the schools and programs supported under the provisions of section 19-5109, Idaho Code. [I.C., § 19-5111, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5111 was repealed. See Compiler's notes, § 19-5101.

19-5112. Agreement by officer to serve — Violations. — (a) Any peace officer attending such schools or programs or directly or indirectly receiving the aid authorized by section 19-5109, Idaho Code, shall execute an agreement whereby said officer promises to remain within the law enforcement profession in the state of Idaho in a position approved by rules and regulations of the council for two (2) years following graduation, subject only to such disqualifications as established by the council and included within the agreement.

(b) Violation of the provisions of this section or the terms of any contract or agreement entered into pursuant to such section shall give rise to a civil action which may be commenced by the council for and on behalf of the state of Idaho for restitution of any and all sums paid by the council plus costs and reasonable attorney's fees. [I.C., § 19-5112, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5112 was repealed. See Compiler's notes, § 19-5101.

19-5113. Investigations — Authority to administer oaths — Subpoenas. — To determine whether the standards, training, qualifications of instructors or schools, the obligations of applicants for aid, or recipients of

aid, are being complied with and for such other purposes as the council deems necessary and not inconsistent with the intent of this act, the director of the Idaho state police or his authorized representative may administer oaths, take depositions and/or issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, memoranda or other information. If any person fails to comply with any subpoena issued under this section or refuses to testify on any matter on which he lawfully may be interrogated, compliance with such subpoena shall be sought in the district court wherein such subpoena was served. [I.C., § 19-5113, as added by 1981, ch. 307, § 2, p. 629; am. 2000, ch. 469, § 38, p. 1450.]

Compiler's notes. Former § 19-5113 was repealed. See Compiler's notes, § 19-5101.

Section 37 of S.L. 2000, ch. 469 is compiled as § 19-5109.

19-5114. Annual reports. — The council shall report annually to the governor and legislature through the director of the Idaho state police on its activities and may make such other reports and recommendations as it deems desirable. [I.C., § 19-5114, as added by 1981, ch. 307, § 2, p. 629; am. 2000, ch. 469, § 39, p. 1450.]

Compiler's notes. Former § 19-5114 was repealed. See Compiler's notes, § 19-5101.

Section 40 of S.L. 2000, ch. 469 is compiled as § 19-5116.

19-5115. Reimbursement for expenses. — Members of the council shall be compensated as provided in section 59-509(b), Idaho Code, to be paid from the funds authorized and appropriated to the council pursuant to the provisions of section 23-404, Idaho Code. [I.C., § 19-5115, as added by 1981, ch. 307, § 2, p. 629.]

Compiler's notes. Former § 19-5115 was repealed. See Compiler's notes, § 19-5101.

Section 3 of S.L. 1981, ch. 307 was repealed.

19-5116. Peace officers standards and training fund. — (a) There is hereby established in the state treasury, the peace officers standards and training fund. All moneys deposited to the fund shall be expended by the peace officers standards and training council for the following purposes:

- (1) Training peace officers, county detention officers, and self-sponsored students, within the state of Idaho, including, but not limited to, sheriffs and their deputies, officers of the Idaho state police and conservation officers of the Idaho department of fish and game, and city and county prosecutors and their deputies;
- (2) Salaries, costs and expenses relating to such training as provided in subsection (1) of this section;
- (3) Such capital expenditures as the peace officers standards and training council may provide, for the acquisition, construction and/or improvement of a peace officers standards and training academy; and
- (4) Such expenditures as may be necessary to aid approved peace officers training programs or county detention officer programs certified as having met the standards established by the peace officers standards and training council.

(b) The peace officers standards and training fund shall be funded as provided in sections 31-3201A and 31-3201B, Idaho Code.

(c) All contributions and other moneys and appropriations which are designated for peace officers standards and training shall be deposited in the peace officers standards and training fund.

(d) Moneys received into the fund as provided in subsection (c) of this section, shall be accounted for separately.

(e) If the fiscal year-end balance in the fund pursuant to sections 31-3201A and 31-3201B, Idaho Code, exceeds one million dollars (\$1,000,000) the excess shall revert to the general fund. [I.C., § 19-5116, as added by 1983, ch. 117, § 1, p. 258; am. 1994, ch. 191, § 1, p. 620; am. 1997, ch. 84, § 3, p. 199; am. 1998, ch. 150, § 1, p. 521; am. 2000, ch. 469, § 40, p. 1450; am. 2003, ch. 237, § 2, p. 607.]

Compiler's notes. Former § 19-5116 which comprised 1969, ch. 415, § 16, p. 1150; am. 1973, ch. 172, § 2, p. 362, was repealed by S.L. 1981, ch. 307, § 1.

Section 2 of S.L. 1997, ch. 84 is compiled as § 19-5109.

Sections 39 and 41 of S.L. 2000, ch. 469 are compiled as §§ 19-5114 and 19-5202, respectively.

Sections 1 and 3 of S.L. 2003, ch. 237 are compiled as §§ 18-918 and 31-3201A respectively.

Section 2 of S.L. 1998, ch. 150 declared an emergency. Approved March 20, 1998.

Sec. to sec. ref. This section is referred to in §§ 19-4705 and 31-3201A.

Opinions of Attorney General. If motor

vehicle registration fees were the sole source of funding for the administration of the Department of Law Enforcement, such funds could not be used to administer programs unrelated to highway construction, repair, maintenance or traffic supervision; however, the Department of Law Enforcement's administration is currently funded from both motor vehicle registration fees and from non-dedicated funds. If the legislative appropriations for administration of the Department of Law Enforcement allocate an amount of non-dedicated funds sufficient to administer programs unrelated to highway construction, repair, maintenance, or traffic supervision, such appropriations would probably not be held to violate Const., Art. 7, § 17. OAG 84-3.

19-5117. Powers of the council — Standards of training, education and employment of county detention officers — Certification — Penalties. — (1) It shall be the duty of and the council shall have the power:

(a) To establish the requirements of minimum basic training which county detention officers shall complete in order to be eligible for permanent employment as a county detention officer;

(b) To establish such basic training and certification so that it can be completed within one (1) year of employment as a county detention officer;

(c) To establish the requirements of minimum training standards for employment as a county detention officer in probationary, temporary, part-time and/or emergency situations;

(d) To certify county detention officers as having completed all requirements established by the council in order to be eligible for permanent employment as a county detention officer;

(e) To receive applications for financial assistance from counties and disburse available state funds to the counties for salaries and allowable living expenses or any part thereof, incurred while in attendance at approved training programs and schools, as authorized by the council. The annual reimbursement authorized by this section shall not exceed the

funds available for such purpose and authorized by section 31-3201B, Idaho Code.

(2) Any county detention officer employed after July 1, 1997, shall be trained and certified within one (1) year of employment. Current county detention officers, who were employed prior to July 1, 1997, shall comply with the training and certification provisions of this section by July 1, 1999. [I.C., § 19-5117, as added by 1997, ch. 84, § 4, p. 199.]

Compiler's notes. Former § 19-5117 which comprised 1969, ch. 415, § 17, p. 1150 was repealed by S.L. 1981, ch. 307, § 1.

Section 5 of S.L. 1997, ch. 84 declared an emergency. Approved March 13, 1997.

19-5118 — 19-5121. Aid to political subdivisions — Peace officer training. [Repealed.]

Compiler's notes. These sections, which comprised 1969, ch. 415, §§ 18-21, p. 1150;

am. 1973, ch. 172, § 2, p. 362, were repealed by S.L. 1981, ch. 307, § 1.

19-5122. Law enforcement commission planning fund. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1969, ch. 415, § 22, p. 1150,

was repealed by S.L. 1976, ch. 51, § 3, effective July 1, 1977.

CHAPTER 52

LAW ENFORCEMENT COMMUNICATIONS

SECTION.

19-5201. Criminal justice teletypewriter — Communications — Intent and purpose.

19-5202. Establishment of network — Use — Rental charge — Interstate connection.

SECTION.

19-5203. Teletypewriter communications board — Creation — Composition — Terms — Rules — Compensation of members.

19-5204. Executive officer of board.

19-5201. Criminal justice teletypewriter — Communications — Intent and purpose. — The maintenance of law and order is, and always has been, a primary function of government and is so recognized in both federal and state constitutions. The state has an unmistakable responsibility to give full support to all public agencies of the criminal justice system. This responsibility includes the provision of an efficient law enforcement communications network available to all state and local agencies. It is the intent of the legislature that such a network be established and maintained in a condition adequate to the needs of the criminal justice system and highway safety. It is the purpose of this act to establish a criminal justice teletypewriter communications network for the state of Idaho. [1971, ch. 195, § 1, p. 884.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 195, compiled as §§ 19-5201 — 19-5204.

Sec. to sec. ref. This chapter is referred to in § 19-5203.

19-5202. Establishment of network — Use — Rental charge — Interstate connection. — (1) Establishment of network. The director of the Idaho state police shall establish a teletypewriter communications network which will interconnect the criminal justice agencies of this state and its political subdivisions and all agencies engaged in the promotion of highway safety into a unified teletypewriter communications system. The director is authorized to lease such transmitting and receiving facilities and equipment as may be necessary to establish and maintain such teletypewriter communications network.

(2) Use of network. The teletypewriter communications network shall be used exclusively for the law enforcement business of the state of Idaho and all the political subdivisions thereof, including all agencies engaged in the promotion of traffic safety.

(3) Judiciary and traffic safety. Nothing in this act shall prohibit the use of or participation in the teletypewriter communications herein provided by the judicial branch of the state government or by any other department, agency or branch of state or local government engaged in traffic safety.

(4) Rental. The monthly rental to be charged each department or agency participating in the teletypewriter communications network on a terminal or unit basis shall be set by the teletypewriter communications board and in setting such rental charge the board shall take into consideration the usage of said network by each participant and of the economic position of each participant. There is hereby created the teletypewriter communications network fund. All rental and use fees collected under the provisions of this chapter shall be paid into the fund.

(5) Interstate connection. The teletypewriter communications network provided for herein is hereby authorized to connect and participate with teletypewriter communications network systems of other states and provinces of Canada. [1971, ch. 195, § 2, p. 884; am. 1974, ch. 27, § 10, p. 811; am. 1983, ch. 181, § 1, p. 491; am. 2000, ch. 469, § 41, p. 1450.]

Compiler's notes. Section 40 of S.L. 2000, ch. 469, is compiled as § 19-5116.

Sec. to sec. ref. This section is referred to in §§ 18-8324 and 67-5008.

19-5203. Teletypewriter communications board — Creation — Composition — Terms — Rules — Compensation of members. —

(1) There is hereby created within the Idaho state police a teletypewriter communications board which shall be composed of five (5) members appointed by the governor.

The members of the teletypewriter communications board shall be composed of the following:

- (a) Two (2) incumbent county sheriffs;
- (b) Two (2) incumbent city chiefs of police;
- (c) One (1) member of the Idaho state police.

(2) The term of office of the first board shall be staggered with the one (1) appointment expiring January 1, 1972; one (1) appointment expiring January 1, 1973; one (1) appointment expiring January 1, 1974; one (1) appointment expiring January 1, 1975; and one (1) appointment expiring January 1, 1976.

Thereafter, the term of office of each chief of police, sheriff and member of the Idaho state police shall be for a term of five (5) years.

The director of the Idaho state police shall be a permanent member of the board.

In the event any chief of police, sheriff or member of the Idaho state police ceases to be such chief of police, sheriff, or member of the Idaho state police his appointment to said board shall terminate and cease immediately and the governor shall appoint a qualified person in such category to fill the unexpired term of such member.

(3) The board shall, upon their appointment, adopt such rules, procedures and methods of operation as may be necessary to establish and put into use the most efficient and economical statewide teletypewriter communications network and shall publish and distribute said rules and procedures to each participating department, agency or office.

(4) The teletypewriter communications board shall have exclusive management control over the entire Idaho law enforcement teletypewriter system (ILETS) which includes all hardware, software, electronic switches, peripheral gear, microwave links, circuitry, and terminal devices which make up the network and any access thereto. The term Idaho law enforcement teletypewriter system (ILETS) shall mean the teletypewriter system established by the director of the Idaho state police pursuant to subsection (1) of section 19-5202, Idaho Code, and shall not apply to any type of voice-oriented transmission whether it be by mobile radio, microwave or telephone.

(5) Salaries and expenses. Members of said board shall be compensated as provided by section 59-509(b), Idaho Code, which expenses shall be paid from moneys appropriated for the funding of this act.

The performance of duties under this act by a member of the board shall be deemed to be in performance of his duties as an employee of his particular branch of government.

(6) Federal funding, gifts, donations. The director is authorized to apply for and accept federal funds granted by the congress of the United States, or by executive order, all of which must be deposited in the teletypewriter communication network fund, and which may be expended only after a legislative appropriation. The director may accept gifts and donations from individuals and private organizations or foundations for all or any of the purposes of chapter 52, title 19, Idaho Code. [1971, ch. 195, § 3, p. 884; am. 1974, ch. 27, § 11, p. 811; am. 1980, ch. 247, § 4, p. 582; am. 1983, ch. 181, § 2, p. 491; am. 1989, ch. 131, § 1, p. 285; am. 2000, ch. 469, § 42, p. 1450.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 195 compiled as §§ 19-5201 — 19-5204.

compiled as §§ 19-5112 (repealed) and 20-208, respectively.

Sections 3 and 5 of S.L. 1980, ch. 247 are

Section 3 of S.L. 1983, ch. 181 is compiled as § 67-5747.

19-5204. Executive officer of board. — The director of the Idaho state police shall be the executive officer of the teletypewriter communications network board and shall be responsible for the carrying out of the policies and rules of the board and with the management and expenditures of such

funds as may be appropriated to implement this act. [1971, ch. 195, § 4, p. 884; am. 1974, ch. 27, § 12, p. 811; am. 2000, ch. 469, § 43, p. 1450.]

Compiler's notes. The words "this act" refer to S.L. 1971, ch. 195 compiled as §§ 19-5201 — 19-5204.

Section 13 of S.L. 1974, ch. 27 is compiled as § 23-804.

Section 44 of S.L. 2000, ch. 469 is compiled as § 19-5402.

Section 5 of S.L. 1971, ch. 195 declared an emergency. Approved March 24, 1971.

Section 196 of S.L. 1974, ch. 27 provided the act should be in full force and effect on and after July 1, 1974.

CHAPTER 53

COMPENSATION OF VICTIMS OF CRIMES

SECTION.

19-5301. Distribution of moneys received as a result of the commission of crime.

19-5302. Victims of crime — Restitution priority.

19-5303. Cost of medical exams to be paid by law enforcement agency.

19-5304. Restitution for crime victims — Orders to be separate — When

SECTION.

restitution is not appropriate — Other remedies — Evidentiary hearings — Definitions.

19-5305. Collection of judgments.

19-5306. Rights of victim during investigation, prosecution, and disposition of the crime.

19-5307. Fines in cases of crimes of violence.

19-5301. Distribution of moneys received as a result of the commission of crime. — (1) Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime, shall pay over to the state treasurer any moneys which would otherwise, by terms of such contract, be owing to the person so convicted or his representatives. The state treasurer shall deposit such moneys in an escrow account for the benefit of and payable to any victim of crimes committed by such person, provided that such person is eventually convicted of the crime or is acquitted on the ground of mental disease or defect excluding responsibility and provided further that such victim, or his personal representative, within five (5) years of the date the escrow account has been established, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives.

(2) The state treasurer, at least once every six (6) months for five (5) years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county of the state where the crime was committed advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section.

(3) Upon disposition of charges favorable to any person accused of committing a crime, or upon a showing by such person that five (5) years have elapsed from the establishment of such escrow account and further that no actions are pending against such person, pursuant to this section the

board shall immediately pay over any moneys in the escrow account to such person.

(4) Notwithstanding the foregoing provisions of this section the state treasurer shall make payments from an escrow account to any person accused of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the proceedings against such person, including the appeals process.

(5) Any action taken by any person convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

(6) The state treasurer may invest the moneys in any escrow account hereunder in any United States government notes or securities.

(7) The attorney general or any other person may bring an action in a court of competent jurisdiction to require the deposit of moneys in an escrow account as provided in this section. [I.C., § 19-5301, as added by 1978, ch. 259, § 1, p. 564.]

Compiler's notes. Section 2 of S.L. 1978, ch. 259 declared an emergency. Approved March 28, 1978.

Sec. to sec. ref. This chapter is referred to in §§ 18-918, 18-4506, 18-8005, 18-8006 and 54-2703.

19-5302. Victims of crime — Restitution priority. — If a district court or a magistrate's division orders the defendant to pay restitution, the court shall order the defendant to pay such restitution to the victim or victims injured by the defendant's action. There shall be a full restitution to such victim or victims before the court may order any payment be made by the defendant to any governmental entity; provided, however, the court may order the defendant to make the payments required in sections 20-225 and/or 20-614(7), Idaho Code, before any payment of restitution is made to the victim or victims. [I.C., § 19-5302, as added by 1984, ch. 86, § 1, p. 168; am. 1985, ch. 122, § 4, p. 296; am. 1986, ch. 197, § 1, p. 494; am. 2004, ch. 21, § 1, p. 23.]

Compiler's notes. Section 3 of S.L. 1985, ch. 122 is compiled as § 19-5306.

Section 2 of S.L. 1986, ch. 197 is compiled as § 19-5304.

Cited in: State v. McCool, — Idaho —, — P.3d —, 2004 Ida. LEXIS 34 (Feb. 26, 2004).

Collateral References. Persons or entities entitled to restitution as "victim" under state criminal restitution statute. 92 A.L.R.5th 35.

19-5303. Cost of medical exams to be paid by law enforcement agency. — When the victim of any crime is directed or authorized by a law enforcement agency to obtain a medical examination for the purpose of procuring evidence for use by a law enforcement agency in the investigation or prosecution of the crime, the expense incurred shall be paid by the law enforcement agency. Provided however, the cost of forensic and/or medical examinations of alleged victims of sexual assault shall be paid for from the crime victims compensation account, as established by section 72-1009, Idaho Code. The provisions of this section shall not be construed to require

a law enforcement agency to bear the expense of any medical treatment of the victim. [I.C., § [19-5303] 19-5302, as added by 1984, ch. 191, § 1, p. 440; am. and redesiɡ. 1985, ch. 122, § 7, p. 296; am. 2001, ch. 144, § 1, p. 512.]

Compiler's notes. This section was enacted as § 19-5302 and was amended and redesignated as § 19-5303 by § 7 of S.L. 1985, ch. 122.

Sections 6 and 8 of S.L. 1985, ch. 122 are

compiled as §§ 20-223 and 19-3008, respectively.

Section 2 of S.L. 2001, ch. 144 is compiled as § 72-1019.

19-5304. Restitution for crime victims — Orders to be separate — When restitution is not appropriate — Other remedies — Evidentiary hearings — Definitions. — (1) As used in this chapter:

(a) "Economic loss" includes, but is not limited to, the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct, but does not include less tangible damage such as pain and suffering, wrongful death or emotional distress.

(b) "Found guilty of any crime" shall mean a finding by a court that a defendant has committed a criminal act and shall include an entry of a plea of guilty, an order withholding judgment, suspending sentence, or entry of judgment of conviction for a misdemeanor or felony.

(c) "Value" shall be as defined in section 18-2402(11), Idaho Code.

(d) "Property" shall be as defined in section 18-2402(8), Idaho Code.

(e) "Victim" shall mean:

(i) The directly injured victim which means a person or entity, who suffers economic loss or injury as the result of the defendant's criminal conduct and shall also include the immediate family of a minor and the immediate family of the actual victim in homicide cases;

(ii) Any health care provider who has provided medical treatment to a directly injured victim if such treatment is for an injury resulting from the defendant's criminal conduct, and who has not been otherwise compensated for such treatment by the directly injured victim or the immediate family of the directly injured victim;

(iii) The account established pursuant to the crime victims compensation act, chapter 10, title 72, Idaho Code, from which payment was made for medical treatment, services or monetary benefits for injury resulting from the defendant's criminal conduct;

(iv) A person or entity who suffers economic loss because such person or entity has made payments to or on behalf of a directly injured victim pursuant to a contract including, but not limited to, an insurance contract.

(2) Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order a defendant found guilty of any crime which results in an economic loss to the victim to make restitution to the victim. An order of restitution shall be a separate written order in addition to any other sentence the court may impose, including incarceration, and may be complete, partial, or nominal. The court may also include restitution as a term and condition of judgment of conviction; however, if a

court orders restitution in the judgment of conviction and in a separate written order, a defendant shall not be required to make restitution in an amount beyond that authorized by this chapter. Restitution shall be ordered for any economic loss which the victim actually suffers. The existence of a policy of insurance covering the victim's loss shall not absolve the defendant of the obligation to pay restitution.

(3) If the court determines that restitution is inappropriate or undesirable or if only partial or nominal restitution is ordered, it shall enter an order articulating the reasons therefor on the record.

(4) If a separate written order of restitution is issued, an order of restitution shall be for an amount certain and shall be due and owing at the time of sentencing or at the date the amount of restitution is determined, whichever is later. An order of restitution may provide for interest from the date of the economic loss or injury.

(5) The court may order the defendant to pay restitution to the victim in any case, regardless of whether the defendant is incarcerated or placed on probation. The court may order the defendant to pay all or a part of the restitution ordered to the court to be distributed by the court to the victims in a manner the court deems just.

(6) Restitution orders shall be entered by the court at the time of sentencing or such later date as deemed necessary by the court. Economic loss shall be based upon the preponderance of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator. Each party shall have the right to present such evidence as may be relevant to the issue of restitution, and the court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.

(7) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of economic loss sustained by the victim as a result of the offense, the financial resources, needs and earning ability of the defendant, and such other factors as the court deems appropriate. The immediate inability to pay restitution by a defendant shall not be, in and of itself, a reason to not order restitution.

(8) In determining restitution, where it appears that more than one (1) person is responsible for a crime that results in economic loss to a victim, and one (1) or more of the suspects or defendants are not found, apprehended, charged, convicted or ordered to pay restitution, the court may require the remaining defendant or defendants, who are convicted of or plead guilty to the crime, to be jointly and severally responsible for the entire economic loss to the victim.

(9) The court may, with the consent of the parties, order restitution to victims, and/or any other person or entity, for economic loss or injury for crimes which are not adjudicated or are not before the court.

(10) A defendant, against whom a restitution order has been entered, may, within forty-two (42) days of the entry of the order of restitution, request relief from the restitution order in accordance with the Idaho rules of civil procedure relating to relief from final orders.

(11) An order of restitution shall not preclude the victim from seeking any other legal remedy.

(12) Every presentence report shall include a full statement of economic loss suffered by the victim or victims of the defendant's crime or crimes.

(13) If there is more than one (1) victim, the restitution order shall provide that the directly injured victim(s) be fully compensated for so much of the loss caused by the defendant's criminal conduct which has not been paid by a third party, including persons referred to in subsection (1)(e)(ii), (iii) and (iv) of this section. [I.C.; § 19-5304, as added by 1985, ch. 122, § 1, p. 296; am. 1986, ch. 197, § 2, p. 494; am. 1991, ch. 324, § 1, p. 841; am. 1997, ch. 112, § 1, p. 272; am. 1999, ch. 338, § 1, p. 916.]

Compiler's notes. Section 1 of S.L. 1986, ch. 197 is compiled as § 19-5302.

Section 2 of S.L. 1997, ch. 112 is compiled as § 72-1024.

Section 2 of S.L. 1991, ch. 324 declared an emergency. Approved April 4, 1991.

Section 2 of S.L. 1999, ch. 338 declared an emergency. Approved March 24, 1999.

Sec. to sec. ref. This section is referred to in §§ 18-7040, 19-5307, 20-223, 20-520, 25-903, and 32-1301.

Cited in: State v. McCool, — Idaho —, — P.3d —, 2004 Ida. LEXIS 34 (Feb. 26, 2004).

ANALYSIS

Appropriateness of restitution.

—“Victim.”

Attorney's fees.

Consent to restitution.

Direct appeal.

Discretion.

Economic loss.

Entry of order.

Inability to pay.

Insurance payments.

Joint and several liability.

Jurisdiction of court.

Limitation on order.

Presentence report.

Relief from order.

Scope of restitution.

Stolen property.

Timeliness.

Appropriateness of Restitution.

Pursuant to subsection (2) of this section, a trial court “shall order” restitution to the victim where the defendant is found guilty of a crime which results in economic loss to the victim, unless the court determines restitution is inappropriate or undesirable. In determining whether restitution is appropriate the court shall consider the factors set forth in subsection (7) of this section. State v. Bybee, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

The court did not abuse its discretion by ordering a defendant convicted of grand theft to pay over \$1,600,000 in restitution even though the defendant was 61 years old, had no present assets, and was to serve an uncertain period of incarceration under an indeter-

minate 14-year sentence, where the court noted that defendant had business acumen to earn money for restitution upon his eventual release from prison. State v. Bybee, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Trial court did not abuse its discretion in ordering defendant to pay restitution to the victims of the defendant's criminal offenses because the evidence as to damages paid by the insurers was sufficient to support the restitution order, and the order was not erroneous merely because of defendant's claimed inability to pay. State v. Taie, 138 Idaho 878, 71 P.3d 477 (Ct. App. 2003).

—“Victim.”

Legislature did not intend to include insurance and similar entities in its definition of “victim” under this section; therefore lower court did not err in denying restitution from defendant, convicted of felony injury to a child, to insurer for amounts paid on behalf of the child. State v. Gardiner, 127 Idaho 156, 898 P.2d 615 (Ct. App. 1995).

Attorney's Fees.

Defendant who prevailed in an action to vacate a restitution order entered against him for damage to property caused by arson was not entitled to attorney fees. He failed to present any authority for such an award. State v. Ferguson, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Consent to Restitution.

In prosecution for grand theft statements by defendant and his counsel during sentencing hearing where prosecution presented evidence from mining company to establish amount of total loss allegedly resulting from defendant's misappropriations, that defendant intended to pay the entire loss suffered by the company and that he had no objection to including the amount of the civil judgment obtained by the mining company against him in the restitution order, even if these representations were construed as consent, the purported consent was not within the framework of this section for the mining company was not named as the victim as that term is defined in the statute of any criminal conduct by defendant above the amount. State v.

Aubert, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

Where charges originally filed against defendant for burglary and grand theft of property from the home of victim were dismissed when defendant agreed to plead guilty to other charges stemming from unrelated thefts, the district court's order that the defendant pay restitution to victim and her insurer was not authorized under subsection (9) of this section, which authorizes a trial court to order restitution to victims of crime that were charged, not adjudicated, only if defendant consents. *State v. Hargis*, 126 Idaho 727, 889 P.2d 1117 (Ct. App. 1995).

Direct Appeal.

Inasmuch as subsection (10) of this subsection creates a permissive option ("may ... request"), it is not an impediment or condition precedent to defendant's choice to appeal directly from the judgment of conviction in order to challenge the legality of the restitutive order. *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

Defendant is precluded, on appeal, from raising the issue that the district court abused its discretion under this section when it directed defendant to pay restitution to various individuals or entities named in the district court restitution order without a showing that the individuals or entities named actually were victims of defendant's actions, because defendant did not initially seek relief on this ground in district court. *State v. Dorsey*, 126 Idaho 659, 889 P.2d 93 (Ct. App. 1995).

Noncustodial father's right to appeal from an order of restitution included in conviction and sentencing for interference with child custody, accrued as of the date of the entry of conviction. *State v. Levicek*, 131 Idaho 130, 953 P.2d 214 (1998).

When defendant failed to provide the appellate court with a record or documentation of any restitution evidentiary hearings, it presumed the district court did not err in determining that the economic damages were suffered and affirmed the order of restitution. *State v. Richmond*, 137 Idaho 35, 43 P.3d 794 (Ct. App. 2002).

Discretion.

An abuse of discretion may be shown if the order of restitution was the result of arbitrary action rather than logical application of proper factors in subsection (7) of this section. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Where statutory authority to order restitution exists, the decision whether to require restitution is within the trial court's sound discretion; however, the exercise of discretion must be within the boundaries governing the available choices and consistent with any

legal standards applicable to those choices. *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

Since this section provides that restitution orders be entered by the court at the time of sentencing "or such later date as deemed necessary by the court", the restitution order of the district court of March 1994, which did not purport to limit the recovery of restitution or impose any sanction for non-compliance on the part of the prosecutor for failure to comply with the probation order entered in April, 1991, requiring that the claim for court ordered restitution in defendant's criminal case be submitted within thirty days under subsection (6) of this section, was not an abuse of discretion under this section. *State v. Dorsey*, 126 Idaho 659, 889 P.2d 93 (Ct. App. 1995).

This section gives a sentencing judge broad discretion in determining the amount of restitution to be paid in a criminal action and an order for restitution will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Dorsey*, 126 Idaho 659, 889 P.2d 93 (Ct. App. 1995).

The court has discretion in determining the amount of the obligation owed a victim, and a restitution order need not be considered compensation for actual pecuniary loss simply because it matches the victim's loss. *Mabey v. Ellis*, 224 Bankr. 786 (Bankr. D. Idaho 1998).

Economic Loss.

The time spent in a court by a self-employed victim during which that person could otherwise be pursuing his vocation, but who has been called to testify about the losses caused to him through criminal conduct of the defendant, has suffered an economic loss within the meaning of this section. *State v. Russell*, 126 Idaho 38, 878 P.2d 212 (Ct. App. 1994).

Entry of order.

Section 19-5304(b) grants the trial court the authority to enter restitution orders at the time of sentencing or at such later date as deemed necessary by the court. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Section 19-5304(2) does not give a trial court the authority to reopen a criminal case in order to enter the order of restitution; nor does it allow the reopening of a criminal case after the defendant has been discharged. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Section 19-5304(2) grants trial courts the power to order defendants to make restitution to their victim(s) unless the court finds that restitution would be inappropriate or undesirable. An order of restitution is to be a separate written order, in addition to any sentence imposed by the court. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Inability to Pay.

The immediate inability to pay restitution does not, in and of itself, bar the court from ordering restitution. The court may order restitution in contemplation of a future ability to pay, thereby saving the victims the cost and inconvenience of a separate civil proceeding. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Insurance Payments.

In an appeal of a restitution order by a defendant convicted of aggravated driving under the influence of alcohol, the court did not abuse its discretion in refusing to consider evidence that the victim's medical bills had been paid by insurance; such evidence is irrelevant to a court's decision on restitution and a court does not abuse its discretion by declining to consider irrelevant evidence. *State v. Fortin*, 124 Idaho 323, 859 P.2d 359 (Ct. App. 1993).

Joint and Several Liability.

Where more than one person is responsible for a crime that results in economic loss to victims, the court may require a defendant to be joint and severally responsible for the entire economic loss of the victims. Therefore, the court's order for restitution, entered concurrently with the judgment of conviction and commitment of defendant to the Board of Correction and requiring defendant to be responsible for all the economic losses of the victims who were defrauded in his pay-telephone scheme, was consistent with the provisions of this section. *State v. Johnston*, 123 Idaho 222, 846 P.2d 224 (Ct. App. 1993).

Jurisdiction of Court.

Trial court lost authority to enter an order of restitution against arson defendant when the court discharged him from probation two years earlier, finding that he had complied with all of the terms and conditions of his probation. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Limitation on Order.

A restitution order must be limited to the crime or counts to which a defendant pled guilty or on which he was convicted unless the additional restitution was permissible under the "consent" provision of the statute. *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

Subdivision (1)(e) of this section does not necessarily limit victims to be only those named in an information. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

Presentence Report.

The district court properly exercised its discretion in denying vehicular manslaughter defendant's motion to strike from the presentence report the statements of the two

girls who were injured in the auto accident which killed victim, and the statements of the girls' parents. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

Murder defendant's counsel was not ineffective for failing to object to statements by the victim's father in the presentence report concerning impact of the crime; such statements by a victim are allowed under § 19-5306 and immediate family members of a minor are included in the definition of a victim. *Fodge v. State*, 125 Idaho 882, 876 P.2d 164 (Ct. App. 1994).

Relief from Order.

Relief from a restitution order cannot be pursued by motion under I.C.R. 35. Instead, a defendant may, within 42 days of the entry of the restitution order, appeal the order or request relief from the order in accordance with subsection (10) of this section. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

An appeal for relief of a restitution order was considered by Appellate Court, even though the motion was pursued under I.C.R. 35 instead of subsection (10) of this section, since the state raised no issue regarding the procedural error and the appeal was timely filed. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Request for relief from a restitution order is an option available to defendants in a criminal action as an alternative to an immediate appeal. *State v. Levicek*, 131 Idaho 130, 953 P.2d 214 (1998).

Relief from a restitution order cannot be pursued by a motion to reduce or correct a sentence pursuant to I.C.R. 35; rather, a defendant may seek relief pursuant to § 19-5304(10). *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Scope of Restitution.

Since a restitution order must be limited to the crime or counts to which a defendant pled guilty or on which he was convicted, court could not order defendant to make restitution for losses beyond those resulting from the theft for which he was convicted. *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

The clear import of subsection (9) of this section is that a defendant may consent to the entry of an order requiring restitution to the victim of a pending, unadjudicated criminal charge, or to the victim — i.e., person or entity named in a complaint, information or indictment as such, in another criminal action which has been adjudicated, but who is not the victim in the action before the court in which the restitutionary order will be entered. *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991).

Defendant confused the provisions of sub-

section (1) of this section — requiring that a court order a defendant to pay victims for any economic losses directly resulting from the criminal conduct for which the defendant is convicted — with the provisions of § 37-2732(k) — which authorizes the courts to “order restitution for costs incurred by law enforcement agencies in investigation of the violation” for which the defendant is convicted; in this case the District Court expressly ordered restitution pursuant to the latter statute and thus, contrary to defendant’s claim, the District Court had statutory authority, and hence jurisdiction, to order him to pay restitution to the law enforcement agencies. *State v. Hernandez*, 121 Idaho 114, 822 P.2d 1011 (Ct. App. 1991).

To uphold an order of restitution the court must be satisfied that the district court acted within the bounds of discretion in ordering restitution not as the result of arbitrary action but through the logical application of proper factors found in subsection (7) of this section. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

Where before fixing the amount of restitution the district court heard considerable testimony from defendant as to her earning capacity, financial resources and her ability to pay restitution and information in pre-sentence investigation as to employer’s losses for which he was not compensated in bankruptcy settlement, award of restitution was not an abuse of the court’s discretion but the amount of restitution was modified to conform to the proof before the district court of sums for which employer had not been compensation through the bankruptcy settlement proceeding. *State v. Hamilton*, 129 Idaho 938, 935

P.2d 201 (Ct. App. 1997).

The discharge of a debt by bankruptcy does not prevent the district court from imposing a restitution obligation upon the debtor’s subsequent conviction for a crime involving that debt; moreover, outside of the bankruptcy context, a civil settlement of the victim’s claim against a defendant does not bar a restitution order for the same loss. *State v. Hamilton*, 129 Idaho 938, 935 P.2d 201 (Ct. App. 1997).

Stolen Property.

Under subdivision (1)(a), restitution is for economic loss which includes, but is not limited to, the market value of the stolen property at the time and place of the crime. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

Timeliness.

Trial court lacked the authority to reopen defendant’s case two years after discharging him from probation for entry of an order of restitution. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Section 19-5304(6) contemplates that the court may need to grant the prosecution a reasonable amount of time necessary to gather information so as to locate all victims and correctly compute the amount of restitution. It does not, however, vest the court with the power to extend the entry of the order of restitution beyond the closing of the case and the discharge of the defendant. *State v. Ferguson*, 138 Idaho 659, 67 P.3d 1271 (Ct. App. 2002).

Collateral References. Persons or entities entitled to restitution as “victim” under state criminal restitution statute. 92 A.L.R.5th 35.

19-5305. Collection of judgments. — After forty-two (42) days from the entry of the order of restitution or at the conclusion of a hearing to reconsider an order of restitution, whichever occurs later, an order of restitution may be recorded as a judgment and the victim may execute as provided by law for civil judgments. [I.C., § 19-5305, as added by 1985, ch. 122, § 2, p. 296.]

Sec. to sec. ref. This section is referred to in §§ 20-520, 32-1301.

Cited in: *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991); *State v. McCool*, — Idaho —, — P.3d —, 2004 Ida. LEXIS 34 (Feb. 26, 2004).

No Abuse of Discretion.

Even though it was unlikely that a 61-year old defendant with no assets who was sentenced to an indeterminate 14-year sentence for grand theft would ever meet the full amount of the \$1,600,000 in restitution or-

dered by the court, there was no abuse of discretion in ordering the restitution. In the event the defendant was able to obtain some assets, the victims would have ready access to those assets and the order of restitution would provide the essential avenue of relief to the victims because the order would be recorded as a judgment and the victims could execute as provided by law for civil judgments. *State v. Bybee*, 115 Idaho 541, 768 P.2d 804 (Ct. App. 1989).

19-5306. Rights of victim during investigation, prosecution, and disposition of the crime. — (1) Each victim of a criminal or juvenile offense shall be:

- (a) Treated with fairness, respect, dignity and privacy throughout the criminal justice process;
- (b) Permitted to be present at all criminal justice proceedings or juvenile proceedings including probation proceedings;
- (c) Entitled to a timely disposition of the case;
- (d) Given prior notification of trial court, appellate, probation and parole proceedings and, upon request, to information about the sentence, incarceration, placing on probation or release of the defendant;
- (e) Heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration, placing on probation or release of the defendant unless manifest injustice would result;
- (f) Afforded the opportunity to communicate with the prosecution in criminal or juvenile offenses, and be advised of any proposed plea agreement by the prosecuting attorney prior to entering into a plea agreement in criminal or juvenile offenses involving crimes of violence, sex crimes or crimes against children;
- (g) Allowed to refuse an interview, ex parte contact or other request by the defendant or any other person acting on behalf of the defendant, unless such request is authorized by law;
- (h) Consulted by the presentence investigator during the preparation of the presentence report and have included in that report a statement of the impact which the defendant's criminal conduct had upon the victim and shall be allowed to read, prior to the sentencing hearing, the presentence report relating to the crime. The victim shall maintain the confidentiality of the presentence report, and shall not disclose its contents to any person except statements made by the victim to the prosecuting attorney or the court;
- (i) Assured the expeditious return of any stolen or other personal property by law enforcement agencies when no longer needed as evidence;
- (j) Notified whenever the defendant or suspect is released or escapes from custody. When release is ordered prior to final conviction, notice to the victim shall be given by the law enforcement authority from whose custody the defendant was released. When the release is granted subsequent to a final conviction, notice shall be given to the victim by the law enforcement authority from whose custody the defendant was released unless release is granted by the commission of pardons and parole, in which case the commission shall notify the victim. When a release on probation is being considered following a period of retained jurisdiction, notice of the hearing shall be given to the victim by the prosecuting attorney.

(2) Upon the filing of a criminal complaint or juvenile petition, the prosecuting attorney shall inform the victim of the various opportunities provided by this section. The victim may exercise any of the rights provided by this section by completing a written request on a form provided by the prosecuting attorney to the clerk of the district court. The clerk thereafter

shall notify the appropriate authorities of the victim's requests. Notice thereafter shall be given to the victim at the address provided unless the victim subsequently provides a different address. The victim's address shall be kept confidential by the court except for carrying out the provisions of this chapter.

(3) The provisions of this section shall apply equally to the immediate families of homicide victims or immediate families of victims of such youthful age or incapacity as precludes them from exercising these rights personally. The court may designate a representative from the immediate family to exercise these rights on behalf of a deceased, incapacitated, or minor victim.

(4) Nothing in this section shall be construed to authorize a court to dismiss a case, to set aside or void a finding of guilt or an acceptance of a plea of guilty, or to obtain appellate, habeas corpus, or other relief from any criminal judgment, for a violation of the provisions of this section; nor be construed as creating a cause of action for money damages, costs or attorney's fees against the state, a county, a municipality, any agency, instrumentality or person; nor be construed as limiting any rights for victims previously conferred by statute; nor be construed to require the court appointment of legal counsel or the payment of transportation costs.

(5) As used in this section:

- (a) "Victim" is an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime or juvenile offense;
- (b) "Criminal offense" is any charged felony or a misdemeanor involving physical injury, or the threat of physical injury, or a sexual offense;
- (c) "Juvenile offense" is charged conduct that is a violation of law that brings a juvenile within the purview of chapter 5, title 20, Idaho Code, and which conduct committed by a juvenile would be a felony if committed by an adult. [I.C., § 19-5306, as added by 1985, ch. 122, § 3, p. 296; am. 1989, ch. 306, § 1, p. 760; am. 1995, ch. 142, § 1, p. 604; am. 1998, ch. 356, § 1, p. 1114.]

Compiler's notes. Section 4 of S.L. 1985, ch. 122 is compiled as § 19-5302.

Section 9 of S.L. 1985, ch. 122 read: "This act shall be in full force and effect on October 1, 1985, and shall apply to persons against whom a criminal complaint or juvenile petition is filed on or after October 1, 1985."

Cited in: State v. Parker, 117 Idaho 527, 789 P.2d 523 (Ct. App. 1990); State v. Kerrigan, 123 Idaho 508, 849 P.2d 969 (Ct. App. 1993); State v. Wickel, 126 Idaho 578, 887 P.2d 1085 (Ct. App. 1994); State v. Carlson, 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000).

ANALYSIS

Effectiveness of counsel.

Sentencing inquiry by judge.

Victim impact statement.

— Failure to strike.

— Scope.

Effectiveness of Counsel.

Murder defendant's counsel was not ineffective for failing to object to statements by the victim's father in the presentence report concerning impact of the crime; such statements by a victim are allowed under this section and immediate family members of a minor are included in the definition of a victim. *Fodge v. State*, 125 Idaho 882, 876 P.2d 164 (Ct. App. 1994).

Sentencing Inquiry by Judge.

A sentencing judge may properly conduct an inquiry broad in scope, largely unlimited, either as to the kind of information he may consider or the source from which it may come. *State v. Chapman*, 120 Idaho 466, 816

P.2d 1023 (Ct. App. 1991), *aff'd*, 121 Idaho 351, 825 P.2d 74 (1992).

Victim Impact Statement.

In the absence of the death penalty, a sentencing court may properly consider any victim impact statements contained in a presentence report during sentencing and district judge's inquiry into the status of the victim is not inconsistent with the purpose and goals of criminal sentencing procedures. *State v. Bivens*, 119 Idaho 119, 803 P.2d 1025 (Ct. App. 1991).

The right of a crime victim to address the court at the offender's sentencing hearing is guaranteed by both Idaho's Constitution and statutory law. *State v. Guerrero*, 130 Idaho 311, 940 P.2d 419 (Ct. App. 1997).

—Failure to Strike.

The sentencing court did not err by denying defendant's motion to strike the victim impact

statement when it imposed a fixed life prison term for first degree murder. *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990), modified on other grounds, 124 Idaho 107, 856 P.2d 897 (Ct. App. 1993).

The district court properly exercised its discretion in denying vehicular manslaughter defendant's motion to strike from the presentence report the statements of the two girls who were injured in the auto accident which killed victim, and the statements of the girls' parents. *State v. Wersland*, 125 Idaho 499, 873 P.2d 144 (1994).

—Scope.

This section does not contain any limitations which would prevent a victim of a crime, at sentencing, from sharing the victim's opinion of the defendant or making a sentence recommendation. *State v. Matteson*, 123 Idaho 622, 851 P.2d 336 (1993).

19-5307. Fines in cases of crimes of violence. — (1) Irrespective of any penalties set forth under state law, and in addition thereto, the court, at the time of sentencing or such later date as deemed necessary by the court, may impose a fine not to exceed five thousand dollars (\$5,000) against any defendant found guilty of any felony listed in subsection (2) of this section.

The fine shall operate as a civil judgment against the defendant, and shall be entered on behalf of the victim named in the indictment or information, or the family of the victim in cases of homicide or crimes against children, and shall not be subject to any distribution otherwise required in section 19-4705, Idaho Code. A fine created under this section shall be a separate written order in addition to any other sentence the court may impose.

The fine contemplated in this section shall be ordered solely as a punitive measure against the defendant, and shall not be based upon any requirement of showing of need by the victim. The fine shall not be used as a substitute for an order of restitution as contemplated in section 19-5304, Idaho Code, nor shall such an order of restitution or order of compensation entered in accordance with section 72-1018, Idaho Code, be offset by the entry of such fine.

A defendant may appeal a fine created under this section in the same manner as any other aspect of a sentence imposed by the court. The imposition of a fine created under this section shall not preclude the victim from seeking any other legal remedy; provided that in any civil action brought by or on behalf of the victim, the defendant shall be entitled to offset the amount of any fine imposed pursuant to this section against any award of punitive damages.

(2) The felonies for which a fine created under this section may be imposed are those described in:

Section 18-805, Idaho Code (Aggravated arson);

Section 18-905, Idaho Code (Aggravated assault);

Section 18-907, Idaho Code (Aggravated battery);

Section 18-909, Idaho Code (Assault with intent to commit a serious felony);

Section 18-911, Idaho Code (Battery with intent to commit a serious felony);
 Section 18-913, Idaho Code (Felonious administration of drugs);
 Section 18-1501, Idaho Code (Felony injury to children);
 Section 18-1506, Idaho Code (Sexual abuse of a child under the age of sixteen);
 Section 18-1506A, Idaho Code (Ritualized abuse of a child);
 Section 18-1507, Idaho Code (Sexual exploitation of a child);
 Section 18-1508, Idaho Code (Lewd conduct with a child under the age of sixteen);
 Section 18-4001, Idaho Code (Murder);
 Section 18-4006, Idaho Code (Felony manslaughter);
 Section 18-4014, Idaho Code (Administering poison with intent to kill);
 Section 18-4015, Idaho Code (Assault with intent to murder);
 Section 18-4502, Idaho Code (First degree kidnapping);
 Section 18-5001, Idaho Code (Mayhem);
 Section 18-5501, Idaho Code (Poisoning food, medicine or wells);
 Section 18-6101, Idaho Code (Rape);
 Section 18-6108, Idaho Code (Male rape);
 Section 18-6501, Idaho Code (Robbery). [I.C., § 19-5307, as added by 1992, ch. 285, § 1, p. 876; am. 1993, ch. 236, § 1, p. 818.]

ANALYSIS

Purpose.
 Separate order.

Purpose.

In defining crimes of violence in this section, the legislature was not attempting to classify crimes for evidentiary purposes, but was addressing the unrelated issue of fines and the enforcement of those fines as civil judgments. *State v. Thompson*, 132 Idaho 628, 977 P.2d 890 (1999).

Separate Order.

Defendant was found guilty of aggravated assault after he threatened three boys and maneuvered his car in such a way as to appear that he would assault them; defendant was fined, among other things, but a separate order was never entered, which the appellate court remedied, and made the fine enforceable nunc pro tunc *State v. Broadhead*, — Idaho —, 84 P.3d 599 (Ct. App. 2004).

CHAPTER 54

RECORDS CHECKS FOR TRANSFERS OF HANDGUNS

[Null and void if 18 U.S.C. § 922(s) is no longer in effect.]

SECTION.

19-5401. Legislative intent.
 19-5402. Definitions.
 19-5403. Transfer of a handgun — Records check.
 19-5404. Dealer identification number — Fee.
 19-5405. Proof of identity.
 19-5406. Statement of intent transmittal.
 19-5407. Toll-free telephone number.
 19-5408. Records check.
 19-5409. Response.
 19-5410. Delay.

SECTION.

19-5411. Review of disapproval.
 19-5412. Confidentiality.
 19-5413. Wrongful request — Wrongful dissemination.
 19-5414. False statement — False identification.
 19-5415. Wrongful transfer.
 19-5416. Wrongful purchase or receipt.
 19-5417. Liability.
 19-5418. Complete defense.
 19-5419. Exemptions.

19-5401. Legislative intent. — It is the intent of the legislature to establish a state-designed procedure that will provide an alternative to the general requirements of the Brady handgun violence prevention act (Public Law 103-159, 103d Congress) for local and state records checks before transfer of a handgun. The legislature finds the procedure imposed in the federal act to be unworkable and burdensome. This act will better serve the interests of the citizens of this state while fulfilling the basic purposes of the federal act. [I.C., § 19-5401, as added by 1994, ch. 377, § 1, p. 1210.]

Compiler's notes. The Brady Handgun Violence Prevention Act, referred to in the first sentence of this section, is compiled as 18 U.S.C. § 921 et seq.

Section 5 of S.L. 1994, ch. 377 provided that

the provisions of this act shall be null, void and of no force and effect on and after the date on which 18 U.S.C. 922(s) is no longer in effect.

19-5402. Definitions. — As used in this chapter:

(1) "Department" means the Idaho state police.

(2) "Firearms dealer" means any person engaged in the business of importing, manufacturing or dealing in firearms and having a license as an importer, manufacturer or dealer of firearms issued by the United States department of treasury.

(3) "Handgun" means:

(a) A firearm that has a short stock and is designed to be held and fired by the use of a single hand; or

(b) Any combination of parts from which a firearm described in paragraph (a) of this section can be assembled.

(4) "Statement of intent" means ATF form 5300.35 (statement of intent to obtain a handgun(s)) or an equivalent form prescribed by regulations administered by the bureau of alcohol, tobacco and firearms of the United States department of treasury for compliance with the Brady handgun violence prevention act.

(5) "Transfer" and the various derivatives thereof shall include the sale, delivery or other transfer of a handgun.

(6) "Working day" means each day except Saturday, Sunday or a legal state holiday. [I.C., § 19-5402, as added by 1994, ch. 377, § 1, p. 1210; am. 2000, ch. 469, § 44, p. 1450.]

Compiler's notes. The Brady Hangun Violence Prevention Act, referred to in subdivision (4) of this section, is compiled as 18 U.S.C. § 921 et seq.

Sections 43 and 45 of S.L. 2000, ch. 469 are compiled as §§ 19-5204 and 19-5502, respectively.

19-5403. Transfer of a handgun — Records check. — No firearms dealer shall transfer any handgun unless the dealer has:

(1)(a) Obtained a completed statement of intent from the potential buyer or transferee and inspected proof of identity presented by the buyer to verify information provided on the form;

(b) Requested, by means described in this chapter, that the department conduct a records check; and

(c) Obtained a unique approval number from the department and has recorded the date and approval number on the statement of intent; or

(2) Been presented with a license to carry concealed weapons which was issued to the potential buyer pursuant to section 18-3302, Idaho Code, and issued after March 22, 1995; or

(3)(a) Obtained a completed statement of intent from the potential buyer or transferee and inspected proof of identity presented by the buyer to verify information provided on the form;

(b) Furnished a copy of the statement of intent to the county sheriff of the county of residence of the potential buyer; and

(c) Waited five (5) working days and has not received notice from the county sheriff of the county that the potential buyer or transferee is prohibited from receiving or purchasing a handgun under state or federal law. If notice is given by the county sheriff of the county on or before five (5) working days have elapsed that the potential buyer or transferee is not prohibited, the sale may proceed at that time. [I.C., § 19-5403, as added by 1994, ch. 377, § 1, p. 1210; am. 1996, ch. 407, § 1, p. 1349.]

Compiler's notes. Section 2 of S.L. 1996, ch. 407 declared an emergency and provided that the act should be in full force and effect on and after its passage and approval, retro-

active to July 1, 1995. Approved March 20, 1996.

Sec. to sec. ref. This section is referred to in §§ 19-5404, 19-5405.

19-5404. Dealer identification number — Fee. — (1) A firearms dealer must obtain annually a dealer identification number from the department to be eligible to request the records check required in section 19-5403(2), Idaho Code. The dealer identification number is confidential and shall be used for requesting a records check only by the firearms dealer to which it is assigned. If the confidentiality of the number is compromised or the dealer's address or place of business changes, the firearms dealer shall notify the department.

(2) The department shall establish by rule an annual dealer identification number fee not to exceed one hundred dollars (\$100) to be paid by a firearms dealer who intends to transfer any handgun subject to the provisions of this chapter. The fee shall be for the purpose of establishing and maintaining the operation of the records check system established in this chapter and shall be remitted to the instacheck fund which is hereby created. The interest earned on the investment of moneys in the fund shall be returned to the fund. [I.C., § 19-5404, as added by 1994, ch. 377, § 1, p. 1210.]

19-5405. Proof of identity. — To establish proof of identity as required in section 19-5403(1), Idaho Code, a potential buyer or transferee shall present a photo identification issued by a governmental agency. The photo identification, which may be, but is not limited to, an Idaho driver's license, shall include the transferee's name, date of birth and residence address. [I.C., § 19-5405, as added by 1994, ch. 377, § 1, p. 1210.]

19-5406. Statement of intent transmittal. — The firearms dealer shall maintain the original copy of the statement of intent as required by federal regulations administered by the bureau of alcohol, tobacco, and firearms. The firearms dealer shall mail a duplicate copy of the completed

statement of intent to the department within five (5) working days after: (i) requesting the records check for a prospective buyer whose records check results in the issuance of a nonapproval number as described in section 19-5409(2), Idaho Code, and (ii) transferring a handgun without an approval or disapproval number as permitted in sections 19-5409(3) and 19-5410, Idaho Code. [I.C., § 19-5406, as added by 1994, ch. 377, § 1, p. 1210.]

Sec. to sec. ref. This section is referred to in § 19-5412.

19-5407. Toll-free telephone number. — The director of the department shall establish a toll-free telephone number for the purpose of responding to requests for criminal history records checks from firearms dealers required under the provisions of this chapter. The telephone service will be in operation seven (7) days a week, with the exception of Easter, Thanksgiving and Christmas days, with hours of service determined by rule. The director shall employ, train and equip such personnel as are necessary to administer the provisions of this chapter. [I.C., § 19-5407, as added by 1994, ch. 377, § 1, p. 1210.]

19-5408. Records check. — Upon receipt of a request for a records check, the department shall immediately review its records, those of the federal bureau of investigation, national crime information center (NCIC), interstate identification index; records made available by the Idaho department of health and welfare; and any other applicable and accessible records to determine if the buyer or transferee is prohibited from receiving or purchasing a handgun under state or federal law. [I.C., § 19-5408, as added by 1994, ch. 377, § 1, p. 1210.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted. **Sec. to sec. ref.** This section is referred to in § 19-5411.

19-5409. Response. — The department shall provide its response to the requesting dealer immediately or by return call. The response may be:

(1) A unique approval number indicating that the potential buyer or transferee is not prohibited from receiving a handgun; or

(2) A unique disapproval number indicating that the potential buyer or transferee is prohibited from receiving a handgun; or

(3) If the records are incomplete so as to preclude a determination that the purchaser or transferee is disqualified from obtaining a handgun, the department may have up to three (3) working days to obtain this information. By the close of business at the end of the third working day following the request, without regard to whether the dealer has received a reply from the department, the dealer may complete the transaction and shall not be deemed in violation of this chapter with respect to such transaction. [I.C., § 19-5409, as added by 1994, ch. 377, § 1, p. 1210.]

Sec. to sec. ref. This section is referred to in § 19-5406.

19-5410. Delay. — In the event of scheduled computer downtime, electronic failure, or similar emergency beyond the control of the department, the department shall immediately notify the dealer of the reason for, and estimated length of, such delay. After such notification, the department shall, in no event later than the end of the next working day after such notification, either inform the requesting dealer that its records demonstrate that the buyer is prohibited from purchasing a handgun pursuant to state and federal law or provide the dealer with a unique approval number. Unless notified by the end of the next working day that the transfer is prohibited, and without regard to whether the dealer has received a unique approval number, the dealer may complete the transfer and shall not be deemed in violation of this law with respect to such transaction. [I.C., § 19-5410, as added by 1994, ch. 377, § 1, p. 1210.]

Sec. to sec. ref. This section is referred to in § 19-5406.

19-5411. Review of disapproval. — (1) The department shall promulgate rules providing for a review of disapproved handgun transfers. Under the rules, any person who is denied the right to receive or purchase a handgun because the firearms dealer received a disapproval number as the result of the department's records check may request a review of the process as performed by the department under these rules.

(2) The department shall respond to the request for a review within ten (10) working days of its receipt. If the person disagrees with the results of the review, the person may petition the district court in the county of his residence for a writ of mandamus directing the department to issue an approval. If the record as reviewed indicates that the petitioner is not prohibited from receipt or possession of a firearm under Idaho or federal law, the department shall destroy any records it maintains which contain any information derived from the records check described in section 19-5408, Idaho Code. [I.C., § 19-5411, as added by 1994, ch. 377, § 1, p. 1210.]

19-5412. Confidentiality. — The department shall promulgate rules to ensure the confidentiality and security of all information provided and recorded pursuant to this act. Statements of intent received by the department are classified as law enforcement records and, as such, are confidential information and are exempt from public disclosure under chapter 3, title 9, Idaho Code. Statements of intent received by the department pursuant to section 19-5406, Idaho Code, and determined by the department to pertain to a potential buyer or transferee who is qualified to receive a handgun shall be destroyed within five (5) working days of receipt as shall records, in any form, containing information derived from the statement. The department shall maintain NCIC transactions logs to the extent required by federal law. [I.C., § 19-5412, as added by 1994, ch. 377, § 1, p. 1210.]

19-5413. Wrongful request — Wrongful dissemination. — Any firearms dealer or any other person who willfully and intentionally requests a records check from the department for any purpose other than compliance

with this act, or willfully and intentionally disseminates any records information to any person other than the subject of such information shall be guilty of a misdemeanor. [I.C., § 19-5413, as added by 1994, ch. 377, § 1, p. 1210.]

19-5414. False statement — False identification. — Any person who, in connection with the transfer or attempted transfer of a firearm pursuant to this chapter, willfully and intentionally makes any materially false oral or written statement or willfully and intentionally furnishes or exhibits any false identification intended or likely to deceive a firearms dealer shall be guilty of a misdemeanor. [I.C., § 19-5414, as added by 1994, ch. 377, § 1, p. 1210.]

19-5415. Wrongful transfer. — Any firearms dealer who willfully and intentionally transfers a handgun in violation of the provisions of this section or uses another firearms dealer's identification number to request a records check shall be guilty of a misdemeanor. [I.C., § 19-5415, as added by 1994, ch. 377, § 1, p. 1210.]

19-5416. Wrongful purchase or receipt. — Any buyer or transferee who obtains a handgun for the purpose of transferring it to a person who is prohibited from possession of a firearm by Idaho or federal law shall be guilty of a felony. [I.C., § 19-5416, as added by 1994, ch. 377, § 1, p. 1210.]

19-5417. Liability. — The department and its personnel responsible for providing records information shall not be liable criminally or in an action at law for damages: (i) for failure to prevent the transfer of a handgun to a person whose receipt of the handgun is unlawful; or (ii) for preventing a transfer to a person who may lawfully receive a handgun, provided they act in good faith and without malice. [I.C., § 19-5417, as added by 1994, ch. 377, § 1, p. 1210.]

19-5418. Complete defense. — Compliance by a firearms dealer with the provisions of this act shall be a complete defense to any claim or cause of action under the laws of this state for liability or damages arising from the subsequent transfer to any person who is not qualified under state or federal law from receipt of a handgun. [I.C., § 19-5418, as added by 1994, ch. 377, § 1, p. 1210.]

19-5419. Exemptions. — This act does not apply to any of the following:

(1) Transfers of any handgun (including any handgun with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898;

(2) Transfers of any replica of a handgun described in subsection (1) of this section, if the replica is not designed or redesigned to use rim fire or conventional centerfire fixed ammunition, or uses rim fire or conventional centerfire fixed ammunition that is no longer manufactured in the United

States and that is not readily available in the ordinary channels of commercial trade;

(3) Transfers of any handgun between persons who both hold valid federal firearm licenses;

(4) Transfers of any handgun to employees of sheriff's offices, municipal police departments, correctional facilities or agencies, or other criminal justice or governmental agencies when the transfers are made on behalf of an employing agency for official law enforcement purposes. [I.C., § 19-5419, as added by 1994, ch. 377, § 1, p. 1210.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

CHAPTER 55

THE IDAHO DNA DATABASE ACT OF 1996

SECTION.

- 19-5501. Legislative findings — Statement of purpose.
19-5502. Definitions.
19-5503. Responsibility for managing DNA programs — Bureau of forensic services.
19-5504. Implementation of the chapter — Rules.
19-5505. Use of the state databank and database — Duties of bureau of forensic services.
19-5506. Scope of law — Offenders subject to sample collection — Early collection of samples — Restitution.
19-5507. Responsibility for sample collection — Timing of sample collection — Site for sample collection.
19-5508. Additional samples authorized.

SECTION.

- 19-5509. Genetic testing of samples given for another purpose.
19-5510. Applicability of chapter.
19-5511. Collection and forwarding of samples — Liability — Use of force.
19-5512. Penalties.
19-5513. Expungement of information.
19-5514. Limitations on disclosure of information.
19-5515. Dissemination of data, information, and samples for forensic laboratory analysis.
19-5516. Disposal of samples.
19-5517. Operation with existing law — Authority of law enforcement officers.
19-5518. Severability.

19-5501. Legislative findings — Statement of purpose. — The legislature finds that DNA (deoxyribonucleic acid) identification analysis is a useful law enforcement tool for identifying and prosecuting sexual and violent offenders. The purpose of this act is to assist federal, state and local criminal justice and law enforcement agencies within and outside the state in the detection and prosecution of individuals responsible for sex and other violent crimes, as well as in the exclusion of suspects who are being investigated for such crimes. [I.C., § 19-5501, as added by 1997, ch. 120, § 1, p. 341.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Collateral References. Validity, construction, and operation of state DNA database statutes. 76 A.L.R.5th 239.

19-5502. Definitions. — (1) "CODIS" means the federal bureau of investigation's combined DNA index system that allows the storage and

exchange of DNA records submitted by state and local forensic laboratories.

(2) "Director" means the director of the Idaho state police.

(3) "DNA" means deoxyribonucleic acid.

(4) "DNA analysis" means the scientific test of a DNA sample for the purpose of obtaining a DNA profile.

(5) "DNA profile" means the list of one (1) or more genetic types determined for an individual based on variations in DNA sequence.

(6) "DNA record" means DNA information stored in the statewide DNA database system of the bureau of forensic services or CODIS and includes information commonly referred to as a DNA profile.

(7) "DNA sample" means a body fluid or tissue sample provided by any person convicted of a qualifying sex crime or violent crime or any body fluid or tissue sample submitted to the statewide DNA database system for analysis pursuant to a criminal investigation or missing person investigation.

(8) "Forensic laboratory" means the bureau of forensic services of the Idaho state police.

(9) "Law enforcement purpose" means to assist federal, state or local criminal justice and law enforcement agencies within and outside the state of Idaho in identification or prosecution of sex crimes, violent crimes or other crimes and the identification and location of missing and unidentified persons.

(10) "Statewide DNA databank" means the state repository of DNA samples collected under this chapter.

(11) "Statewide DNA database system" means the DNA record system administered by the Idaho bureau of forensic services. [I.C., § 19-5502, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 45, p. 1450; am. 2004, ch. 157, § 1, p. 505.]

Compiler's notes. Section 44 of S.L. 2000, ch. 469 is compiled as § 19-5402.

Section 2 of S.L. 2004, ch 157 is compiled as § 19-5506.

Section 3 of S.L. 2004, ch. 157 declared an emergency. Approved March 23, 2004.

19-5503. Responsibility for managing DNA programs — Bureau of forensic services. — The Idaho state police through the bureau of forensic services shall be responsible for the policy management and administration of the state's database and databank identification program. The bureau of forensic services shall be responsible for liaison with the FBI regarding the state's participation in the CODIS program. [I.C., § 19-5503, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 46, p. 1450.]

19-5504. Implementation of the chapter — Rules. — The Idaho state police, in consultation with the Idaho attorney general's office, the Idaho department of correction, the Idaho chiefs of police association, the Idaho state sheriff's association, and the Idaho prosecuting attorney's association, shall adopt policies, procedures and rules for implementation of this chapter, and ensure that DNA samples are collected from qualifying offenders in a timely manner. The director may designate additional persons and organizations to provide consultation in implementing the provisions of

this chapter. [I.C., § 19-5504, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 47, p. 1450.]

Compiler's notes. Section 48 of S.L. 2000, ch. 469 is compiled as § 19-5506.

19-5505. Use of the state databank and database — Duties of bureau of forensic services. — (1) The bureau of forensic services shall perform or contract for DNA analysis for law enforcement purposes.

(2) The bureau of forensic services shall serve as a repository for DNA samples collected and shall analyze samples, or contract for analysis, and shall store, compile, correlate, maintain and use DNA profiles and records related to:

- (a) Forensic casework;
- (b) Offenders required to provide samples under this chapter;
- (c) The identification and location of missing persons; and
- (d) Anonymous DNA records used for research or quality control.

(3) A match between evidence DNA samples from a criminal investigation and DNA samples from a state or federal database may be used to sustain probable cause for the arrest of a suspect upon application for a warrant.

(4) The DNA profile may also be used at trial as evidence, provided that the evidence is otherwise admissible at trial. The DNA profile may also be used in developing statistical calculations of populations frequencies. [I.C., § 19-5505, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 2, p. 456.]

Compiler's notes. Section 1 of S.L. 1998, ch. 123 changed the heading of chapter 55, title 19.

Section 3 of S.L. 1998, ch. 123 is compiled as § 19-5507.

19-5506. Scope of law — Offenders subject to sample collection — Early collection of samples — Restitution. — (1) Any person, including any juvenile tried as an adult, who is convicted of, or pleads guilty to, any of the following crimes, regardless of the form of judgment or withheld judgment, and regardless of the sentence imposed or disposition rendered, shall be required to provide to the Idaho state police, a DNA sample and a right thumbprint impression:

- (a) Aggravated arson (section 18-805, Idaho Code);
- (b) Aggravated assault (section 18-905, Idaho Code);
- (c) Aggravated battery (section 18-907, Idaho Code);
- (d) Assault with the intent to commit a serious felony (section 18-909, Idaho Code);
- (e) Battery with the intent to commit a serious felony (section 18-911, Idaho Code);
- (f) Domestic violence (section 18-918, Idaho Code, constituting a felony);
- (g) Burglary (sections 18-1401 and 18-1405, Idaho Code), except those convictions in which the defendant entered a retail mercantile establishment and the offense took place when the victim was open to the public for business and the defendant committed a theft and his actions did not constitute grand theft as defined in chapter 24, title 18, Idaho Code;

- (h) Injury to a child (section 18-1501(1), Idaho Code);
- (i) Sexual abuse of a child under the age of sixteen years (section 18-1506, Idaho Code);
- (j) Possession of sexually exploitive material for other than a commercial purpose (section 18-1507A, Idaho Code);
- (k) Lewd conduct with minor child under sixteen (section 18-1508, Idaho Code);
- (l) Sexual battery of a minor child sixteen or seventeen years of age (section 18-1508A, Idaho Code);
- (m) Murder, any degree (sections 18-4001 and 18-4003, Idaho Code);
- (n) Manslaughter (section 18-4006(1) or (2), Idaho Code);
- (o) Kidnapping, any degree (sections 18-4501 and 18-4502, Idaho Code);
- (p) Mayhem (section 18-5001, Idaho Code);
- (q) Rape (section 18-6101, Idaho Code);
- (r) Robbery (section 18-6501, Idaho Code);
- (s) Incest (section 18-6602, Idaho Code);
- (t) Crime against nature (section 18-6605, Idaho Code);
- (u) Forcible sexual penetration (section 18-6608, Idaho Code);
- (v) Racketeering (section 18-7804, Idaho Code);
- (w) Transfer of body fluid which may contain the HIV virus (section 39-608, Idaho Code);
- (x) Failure to register as sex offender (sections 18-8304 and 18-8308, Idaho Code).

(2) In addition to those crimes enumerated in subsection (1) of this section, any person, including any juvenile tried as an adult, who is convicted for an attempt to commit any of the following crimes, regardless of the form of judgment or withheld judgment, and regardless of the sentence imposed or disposition rendered, shall be required to provide to the Idaho state police, a DNA sample and a right thumbprint impression:

- (a) Aggravated arson (section 18-805, Idaho Code);
- (b) Sexual abuse of a child under the age of sixteen years (section 18-1506, Idaho Code);
- (c) Injury to a child (section 18-1501(1), Idaho Code);
- (d) Lewd conduct with minor child under sixteen (section 18-1508, Idaho Code);
- (e) Sexual battery of a minor child sixteen or seventeen years of age (section 18-1508A, Idaho Code);
- (f) Murder, any degree (sections 18-4001 and 18-4003, Idaho Code);
- (g) Kidnapping, any degree (sections 18-4501 and 18-4502, Idaho Code);
- (h) Mayhem (section 18-5001, Idaho Code);
- (i) Rape (section 18-6101, Idaho Code);
- (j) Robbery (section 18-6501, Idaho Code);
- (k) Incest (section 18-6602, Idaho Code);
- (l) Crime against nature (section 18-6605, Idaho Code);
- (m) Forcible sexual penetration (section 18-6608, Idaho Code);
- (n) Transfer of body fluid which may contain the HIV virus (section 39-608, Idaho Code).

(3) This chapter's requirements for submission to tests and procedures for obtaining a DNA sample and thumbprint impression from the persons

described above are mandatory and apply to those persons convicted of such crimes covered in this chapter prior to its effective date, and who, as a result of the offense, are incarcerated in a county jail facility or a penal facility or are under probation or parole supervision after the effective date of this chapter.

(4) The collection of samples and impressions specified in this chapter are required regardless of whether the person previously has supplied a DNA sample to law enforcement agencies in any other jurisdiction.

(5) The requirements of this chapter are mandatory and apply regardless of whether a court advises a person that samples and impressions must be provided to the databank and database as a condition of probation or parole.

(6) Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order any person subject to the provisions of this section to pay restitution to help offset costs incurred by law enforcement agencies for the expense of DNA analysis.

(7) The court may order such person to pay restitution for DNA analysis in an amount not to exceed five hundred dollars (\$500) per DNA sample analysis, or in the aggregate not more than two thousand dollars (\$2,000), regardless of whether:

(a) The source of the sample is the person, the victim or other persons of interest in the case;

(b) Results of the analysis are entered into evidence in the person's criminal case;

(c) The DNA sample was previously analyzed for another criminal case; or

(d) Restitution for that DNA sample analysis was ordered in any other criminal case.

(8) Law enforcement agencies entitled to restitution under this section include the Idaho state police, county and city law enforcement agencies, the office of the attorney general, county prosecuting attorneys and city attorneys.

(9) In the case of reimbursement for DNA analysis performed by the Idaho state police, those moneys shall be paid to the Idaho state police and deposited in the law enforcement fund. In the case of reimbursement to the office of the attorney general, those moneys shall be paid to the general fund.

(10) Persons who have been sentenced to death, or life without the possibility of parole, or to any life or indeterminate term are not exempt from the requirements of this chapter. [I.C., § 19-5506, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 48, p. 1450; am. 2004, ch. 157, § 2, p. 505.]

Compiler's notes. Section 47 of S.L. 2000, ch. 469 is compiled as § 19-5504.

Section 1 of S.L. 2004, ch 157 is compiled as § 19-5502.

Section 3 of S.L. 2004, ch. 157 declared an emergency. Approved March 23, 2004.

Sec. to sec. ref. This section is referred to in § 19-5507.

19-5507. Responsibility for sample collection — Timing of sample collection — Site for sample collection. — (1) A court shall order a DNA sample and thumbprint impression to be taken after conviction and before

sentencing of any person upon application by the prosecuting attorney, the attorney general, or the Idaho state police upon a showing that early collection of such samples will be in the best interest of justice. The DNA samples shall be collected in accordance with procedures established by the bureau of forensic services. The director may designate a state or county correctional facility for sample collection.

(2) Any person, including any juvenile tried as an adult, who comes within the terms of this chapter, and who is granted probation or who serves an entire term of confinement in a state or county facility, or who otherwise bypasses a prison inmate reception center shall, prior to physical release from custody, be required to provide a DNA sample and thumbprint impression at a Idaho state police designated sample collection location. If the person is not incarcerated at the time of sentencing, the court shall order the person to report within ten (10) working days to the facilities designated for the collection of such specimens.

(3) The chief administrative officer of any state or local detention facility, jail or other facility shall cause a DNA sample and thumbprint impression to be collected from the person subject to this chapter during the intake process at the facility, or immediately thereafter at another facility designated for such collection, if DNA samples previously have not been taken pursuant to this chapter.

(4) The director of the department of correction shall cause a DNA sample and thumbprint impression to be collected from any person subject to the terms of this chapter who has been sentenced to serve a term of imprisonment in a state correctional institution and who has not had a DNA sample taken after conviction and before sentencing. The DNA sample and thumbprint impression shall be collected from the person during the intake process at the reception center designated by the director of the department of correction as soon as possible.

(5) Any person subject to the terms of this chapter who is serving a term of imprisonment or confinement, and who did not, for any reason, provide a DNA sample or thumbprint impression for analysis by the bureau of forensic services, shall submit to such tests as soon as practicable, but in any event prior to final discharge, parole, or release from imprisonment or confinement. A person who was convicted prior to the effective date of this chapter is not exempt from these requirements.

(6) As a condition of probation or parole, any person subject to the terms of this chapter and who has not previously submitted a DNA sample and thumbprint impression, shall upon notice by a law enforcement agency or an agent of the department of correction, be required to provide a DNA sample and thumbprint impression if it has been determined that such sample and thumbprint impression are not in the possession of the bureau of forensic services. That person is required to have the sample and impression taken within ten (10) working days at the designated county or state facility.

(7) When the state accepts an offender from another state under any interstate compact, or under any other reciprocal agreement with any county, state or federal agency, or any other provision of law, whether or not the offender is confined or released, the acceptance is conditional on the

offender providing a DNA sample and thumbprint impression if the offender was convicted of an offense which would qualify as a crime described in section 19-5506, Idaho Code, if committed in this state, or if the person was convicted of an equivalent offense in any other jurisdiction. If the offender from another state is not confined, the samples and impression required by this chapter must be provided within ten (10) working days after the offender reports to the supervising agent or within ten (10) working days of notice to the offender, whichever occurs first. The person shall report to the designated sample collection facility or facilities to have the sample and impression taken. If the offender from another state is confined, he or she shall provide the DNA sample and thumbprint impression as soon as practicable after receipt in a state or county correctional facility or other facility, and, in any event, before completion of the person's term of imprisonment, if that person is to be discharged.

(8) Any inmate serving a term of incarceration for committing an offense listed in section 19-5506, Idaho Code, who is released on parole, furlough, or other release, and is returned to a state or local correctional institution for a violation of a condition of that release, and that inmate has not previously provided a DNA sample and thumbprint impression, shall provide a sample and impression upon returning to the state correctional institution. [I.C., § 19-5507, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 3, p. 456; am. 2000, ch. 469, § 49, p. 1450.]

Compiler's notes. Sections 2 and 4 of S.L. 1998, ch. 123 are compiled as §§ 19-5505 and 19-5509, respectively. Section 50 of S.L. 2000, ch. 469 is compiled as § 19-5510.

19-5508. Additional samples authorized. — Whenever the bureau of forensic services notifies the department of correction or other responsible agency that a DNA sample or thumbprint impression is not adequate for any reason, the department of correction or other custodial agency shall draw or take additional samples and impressions as necessary to satisfy the requirements of this chapter, and transmit such samples and impressions to the bureau of forensic services. [I.C., § 19-5508, as added by 1997, ch. 120, § 1, p. 341.]

19-5509. Genetic testing of samples given for another purpose. — If a person has been convicted of a crime as provided by this chapter and has given a DNA sample or samples to law enforcement for any purpose, the bureau of forensic services is authorized to analyze such samples for DNA, and include the DNA profiles from such samples in the state's convicted felon DNA databank and databases. This provision applies whether the DNA sample originally collected was from a sexual or violent offender pursuant to the databank and database program, and whether the crime committed predated the effective date of this chapter, or any amendments thereto. This provision does not relieve a person subject to the terms of this chapter from giving a DNA sample and thumbprint impression for the DNA databank and database. [I.C., § 19-5509, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 4, p. 456.]

Compiler's notes. Sections 3 and 5 of S.L. 1998, ch. 123 are compiled as §§ 19-5507 and 19-5511, respectively.

19-5510. Applicability of chapter. — Any person subject to the terms of this chapter who has not provided a DNA sample and thumbprint impression for any reason, including the person's release prior to the enactment of this chapter, an oversight or error, or because of the person's transfer from another jurisdiction shall give a DNA sample and thumbprint impression for inclusion in the state's DNA database and databank within ten (10) working days of such person being notified of this requirement by the Idaho state police, the department of correction or an officer of the court. The samples and impressions shall be collected in a facility designated by the Idaho state police. [I.C., § 19-5510, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 50, p. 1450.]

Compiler's notes. Section 49 of S.L. 2000, ch. 469 is compiled as § 19-5507.

19-5511. Collection and forwarding of samples — Liability — Use of force. — (1) The director of the department of correction or the chief administrative officer of the detention facility, jail, other facility at which the DNA sample and thumbprint impression were collected shall forward the samples and impressions to the bureau of forensic services according to requirements set forth in the bureau of forensic services rules.

(2) The bureau of forensic services shall provide all specimen collection materials, thumbprint cards, mailing tubes, envelopes, labels and instructions for the collection of the samples and thumbprint impressions. The DNA samples and thumbprint impressions shall thereafter be forwarded to the bureau of forensic services for analysis of DNA.

(3) The bureau of forensic services shall adopt rules specifying how DNA samples are to be taken. The right thumbprint impression shall be taken on a form prescribed by the Idaho state police.

(4) No person or governmental agency shall be subject to civil or criminal liability for obtaining DNA samples or obtaining thumbprint impressions absent a showing of reckless disregard for medically accepted practices or a showing of malice.

(5) Duly authorized law enforcement and correction personnel shall employ reasonable force in cases where an individual who is incarcerated refuses or resists submission to procedures for collecting a DNA sample or thumbprint impression authorized by this chapter, and no employee shall be subject to criminal or civil liability for the reasonable use of force absent a showing of malice. [I.C., § 19-5511, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 5, p. 456; am. 2000, ch. 469, § 51, p. 1450.]

Compiler's notes. Sections 4 and 6 of S.L. 1998, ch. 123 are compiled as §§ 19-5509 and 19-5514, respectively. Section 52 of S.L. 2000, ch. 469 is compiled as § 19-5513.

19-5512. Penalties. — Any person subject to the terms of this chapter who fails to give a DNA sample or thumbprint impression, after a request by the bureau of forensic services, the department of correction, any law enforcement personnel, or any officer of the court, is guilty of a felony. The samples and impressions required by this chapter may be taken by the use of reasonable force once a person is imprisoned for failure to give the required sample. [I.C., § 19-5512, as added by 1997, ch. 120, § 1, p. 341.]

19-5513. Expungement of information. — (1) A person whose DNA profile has been included in the database and databank pursuant to this chapter may make a written request for expungement of materials from the database and databank on the grounds that the conviction upon which the authority for including the DNA profile was based has been reversed and the case dismissed.

(2) The person requesting expungement must send a copy of his request, with proof of service on all parties to the following: the trial court which entered the conviction or rendered disposition in the case; the bureau of forensic services; and the prosecuting attorney of the county in which he was convicted. The court has the discretion to grant or deny the request for expungement. A trial court's denial of a request for expungement is an order not subject to appeal.

(3) Except as provided below, the Idaho state police shall expunge the DNA sample and all identifiable information in the database and databank relating to the subject of the conviction upon receipt of a court order which verifies that the applicant has made the necessary showing at a noticed hearing, and which includes the following documents:

- (a) Written request for expungement pursuant to this section;
- (b) A certified copy of the court order reversing and dismissing the conviction;
- (c) Proof of written notice to the prosecuting attorney and the bureau of forensic services that such expungement is being sought; and
- (d) A court order finding that no retrial or appeal of the case is pending and verifying that at least sixty (60) days have passed since the defendant has notified the prosecuting attorney and the bureau of forensic services of the expungement request and that the court finds no reason, based on the interests of justice, to deny expungement.

(4) Upon order of the court, the Idaho state police shall destroy the DNA sample relating to the subject of conviction, unless the state police determines that the person has otherwise become obligated to submit to DNA sample and thumbprint impression as a result of a separate conviction subject to the terms of this chapter.

(5) The bureau of forensic services is not required to destroy an item of physical evidence obtained from the DNA sample if evidence relating to another person subject to the provisions of this chapter would thereby be destroyed. Notwithstanding this subsection, no sample, physical evidence or identifiable information is affected by an order to set aside a conviction. [I.C., § 19-5513, as added by 1997, ch. 120, § 1, p. 341; am. 2000, ch. 469, § 52, p. 1450.]

Compiler's notes. Section 51 of S.L. 2000, ch. 469 is compiled as § 19-5511.

19-5514. Limitations on disclosure of information. — (1) All DNA profiles retained by the bureau of forensic services pursuant to this chapter shall be treated as confidential as provided by chapter 3, title 9, Idaho Code.

(2) The DNA information shall be filed with the offender's file maintained by the Idaho state police.

(3) The DNA information shall not be included in the state summary criminal history information.

(4) The DNA information, and thumbprint impressions, shall be released only to law enforcement agencies, including, but not limited to, parole officers of the department of correction, hearing officers of the parole authority, and prosecuting attorneys' offices, at the request of the agency, except as specified in this chapter. Dissemination of this information to law enforcement agencies and prosecuting attorneys' offices outside the state shall be done in conformity with the provisions of this chapter.

(5) Any person who, by virtue of employment or official position, or any person contracting to carry out any function under this chapter, including any officers, employees and agents of such contractor who has possession of or access to individual identifiable DNA information contained in the state DNA database or databank and who willfully discloses such information in any manner to any person or agency not entitled to receive it is guilty of a misdemeanor.

(6) Furnishing DNA information or thumbprint comparison results to defense counsel for criminal defense purposes in compliance with discovery is not a violation of this section.

(7) It is not a violation of this section to disseminate statistical or research information obtained from the offender's file, the computerized databank system, or any of the bureau of forensic services' databases provided that the subject of the file is not identified and cannot be identified from the information disclosed. It is also not a violation of this section to include information obtained from a file in a transcript or record of a judicial proceeding or in any other public record when the inclusion of the information in the public record is authorized by a court, statute or case law. [I.C., § 19-5514, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 6, p. 456; am. 2000, ch. 469, § 53, p. 1450.]

Compiler's notes. Sections 5 and 7 of S.L. 1998, ch. 123 are compiled as §§ 19-5511 and 19-5517, respectively.

Section 54 of S.L. 2000, ch. 469 is compiled as § 20-516.

Sec. to sec. ref. This section is referred to in § 9-340C.

19-5515. Dissemination of data, information, and samples for forensic laboratory analysis. — (1) Nothing in this chapter shall prohibit the sharing or disseminating of population database information with the following:

(a) Federal, state or local law enforcement agencies;

- (b) Forensic laboratories that serve federal, state and local law enforcement agencies approved by the bureau of forensic services;
- (c) A state's attorney general's office;
- (d) A prosecuting attorney's office; or
- (e) Any third party that the chief of the bureau of forensic services deems necessary to assist the bureau of forensic services with statistical analyses of the population database or to assist in the recovery or identification of missing persons.

(2) Nothing in this chapter shall prohibit the sharing or dissemination of protocol and forensic DNA methods and quality control procedures with any of the parties identified in subsection (1) of this section.

(3) The state's DNA population database and databank may be made available to and searched by the FBI and any agency participating in CODIS.

(4) The bureau of forensic services may provide samples from the DNA samples collected pursuant to this chapter to public DNA laboratories for law enforcement purposes provided that the privacy provisions of this section are followed and each of the following conditions are met:

- (a) The methodologies and procedures used by the public DNA laboratory for analysis are approved by the bureau of forensic services;
- (b) Only tests of value to law enforcement for identification purposes are performed and a copy of the results of the analysis are sent to the bureau of forensic services;
- (c) All provisions concerning privacy and security enumerated in this section are followed. [I.C., § 19-5515, as added by 1997, ch. 120, § 1, p. 341.]

19-5516. Disposal of samples. — The bureau of forensic services is authorized to have unused portions of samples or expired samples disposed of in the normal course of business and in an environmentally approved manner as long as such disposal method is designed to protect the identity and origin of samples from disclosure to third persons who are not part of law enforcement. [I.C., § 19-5516, as added by 1997, ch. 120, § 1, p. 341.]

19-5517. Operation with existing law — Authority of law enforcement officers. — Nothing in this chapter shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store and use DNA information or thumbprint impressions for law enforcement purposes. [I.C., § 19-5517, as added by 1997, ch. 120, § 1, p. 341; am. 1998, ch. 123, § 7, p. 456.]

Compiler's notes. Section 6 of S.L. 1998, ch. 123 is compiled as §§ 19-5514.

19-5518. Severability. — The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act. [I.C., § 19-5518, as added by 1997, ch. 120, § 1, p. 341.]

CHAPTER 56

IDAHO DRUG COURT ACT

SECTION.

- 19-5601. Short title.
19-5602. Statement of policy.
19-5603. Drug court — Establishment.
19-5604. Eligibility.

SECTION.

- 19-5605. Drug court evaluation.
19-5606. Implementation of drug courts.
19-5607. Drug court funding.
19-5608. Drug court fee.

19-5601. Short title. — This chapter shall be known and may be cited as the “Idaho Drug Court Act.” [I.C., § 19-5601, as added by 2001, ch. 337, § 1, p. 1196.]

Compiler’s notes. Section 2 of S.L. 2001, ch. 337 is compiled as § 31-3201E.

19-5602. Statement of policy. — The legislature finds that:

(1) Substance abuse is a contributing cause for much of the crime in Idaho, costs millions of dollars in productivity, contributes to the ever increasing jail and prison populations and adversely impacts Idaho children;

(2) Drug courts which closely supervise, monitor, test and treat substance abusers have proven effective in certain judicial districts in Idaho and in other states in reducing the incidence of drug use, drug addiction, and crimes committed as a result of drug use and drug addiction. Successful drug courts are based on partnerships among the courts, law enforcement, corrections and social welfare agencies;

(3) It is in the best interests of the citizens of this state to expand the use of drug courts in Idaho.

The goals of the drug courts created by this chapter are to reduce the overcrowding of jails and prisons, to reduce alcohol and drug abuse and dependency among criminal and juvenile offenders, to hold offenders accountable, to reduce recidivism, and to promote effective interaction and use of resources among the courts, justice system personnel and community agencies. [I.C., § 19-5602, as added by 2001, ch. 337, § 1, p. 1196.]

19-5603. Drug court — Establishment. — The district court in each county may establish a drug court which shall include a regimen of graduated sanctions and rewards, substance abuse treatment, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements as may be established by the district court, in accordance with standards developed by the Idaho supreme court drug court coordinating committee. [I.C., § 19-5603, as added by 2001, ch. 337, § 1, p. 1196.]

19-5604. Eligibility. — No person has a right to be admitted into drug court. The drug court in each county shall determine the eligibility of persons who may be admitted into drug court except that each candidate, prior to being admitted, must undergo: (a) a substance abuse assessment;

and (b) a criminogenic risk assessment. No person shall be eligible to participate in drug court if any of the following apply:

(1) The person is currently charged with, has pled or has been adjudicated or found guilty of, a felony crime of violence or a felony crime in which the person used either a firearm or a deadly weapon or instrument.

(2) The person is currently charged with, or has pled or been found guilty of, a felony in which the person committed, attempted to commit, conspired to commit, or intended to commit a sex offense. [I.C., § 19-5604, as added by 2001, ch. 337, § 1, p. 1196.]

19-5605. Drug court evaluation. — The district court of each county which has implemented a drug court program shall annually evaluate the program's effectiveness and provide a report to the supreme court as requested. A report evaluating the effectiveness of drug courts in the state shall be submitted to the governor and to the legislature by the first day of the legislative session each year. [I.C., § 19-5605, as added by 2001, ch. 337, § 1, p. 1196.]

19-5606. Implementation of drug courts. — The supreme court shall establish a drug court coordinating committee consisting of judges, court administrators, drug court coordinators, prosecuting attorneys, public defenders, state and county probation officers, treatment providers, representatives of the department of correction, the department of education, the commission of pardons and parole, the department of health and welfare, the department of juvenile corrections, the Idaho state police, the Idaho transportation department, legislators, a representative of the governor's office, law enforcement officers, mental health professionals, and others, which shall establish a drug court implementation plan and oversee ongoing drug court programs. The implementation plan shall include a strategy to forge partnerships among drug courts, public agencies, and community-based organizations to enhance drug court effectiveness. The committee shall also develop guidelines for drug courts addressing eligibility, identification and screening, assessment, treatment and treatment providers, case management and supervision, and evaluation. The coordinating committee shall also solicit specific drug court plans, and recommend funding priorities and decisions per judicial district; pursue all available alternate funding; provide technical assistance, develop procedural manuals, and schedule training opportunities for the drug court teams; design an evaluation strategy, including participation in the statewide substance abuse evaluation plan; and design an automated drug court management information system, which promotes information sharing with other entities. [I.C., § 19-5606, as added by 2001, ch. 337, § 1, p. 1196.]

19-5607. Drug court funding. — Subject to the appropriation power of the legislature, the supreme court shall be responsible for administering, allocating and apportioning all appropriations from the legislature for drug courts. [I.C., § 19-5607, as added by 2001, ch. 337, § 1, p. 1196.]

19-5608. Drug court fee. — Each person admitted into a drug court shall pay the drug court fee as established in section 31-3201E, Idaho Code. [I.C., § 19-5608, as added by 2004, ch. 249, § 2, p. 714.]

Compiler's notes. Section 1 of S.L. 2004, ch. 249 is compiled as § 31-3201E.

TITLE 20

STATE PRISON AND COUNTY JAILS

CHAPTER.

1. STATE PENITENTIARY, §§ 20-101 — 20-111.
2. STATE BOARD OF CORRECTIONS, §§ 20-201 — 20-249.
3. OUT-OF-STATE PAROLEE SUPERVISION ACT, §§ 20-301, 20-302.
4. CORRECTIONAL INDUSTRIES ACT, §§ 20-401 — 20-419.

CHAPTER.

5. JUVENILE CORRECTIONS ACT, §§ 20-501 — 20-549.
6. COUNTY JAILS, §§ 20-601 — 20-628.
7. INTERSTATE CORRECTIONS COMPACT, §§ 20-701 — 20-705.
8. PRIVATE PRISON FACILITIES, §§ 20-801 — 20-812.

CHAPTER 1

STATE PENITENTIARY

SECTION.

- 20-101. Establishment and use of penitentiary and rehabilitation centers.
- 20-101A. Good conduct reduction of sentences.
- 20-101B. Forfeiture of good conduct reduction.
- 20-101C. Furlough — Conditions — Failure to return — Specifically authorized for funerals and accident or illness.

SECTION.

- 20-101D. Meritorious reduction of sentence.
- 20-102. Penitentiary permanent endowment fund.
- 20-102A. Penitentiary earnings reserve fund.
- 20-103. Penitentiary income fund.
- 20-104. Transfer of convicted foreign citizens or nationals under treaty.
- 20-111. Prisoners in state penitentiary — Justifiable killing or wounding.

20-101. Establishment and use of penitentiary and rehabilitation centers. — There shall be continually maintained for the care and custody of prisoners in Idaho, correctional facilities, and state rehabilitation centers, for use by the state board of correction located in the county of Ada and at such other places in the state of Idaho as may be determined by the board of correction; provided however that no facility may be acquired except as provided by law. All offenders convicted and sentenced according to law to imprisonment in the state prison, shall be committed to the custody of the state board of correction. All persons convicted of crimes against the laws of this state, and sentenced to confinement in the state prison shall be committed to the custody of the state board of correction, and must, during the term of their confinement, perform such labor under such rules and regulations as may be prescribed by the state board of correction. [Part of R.S., § 8500 and 1890-1891, p. 21, § 1; reen. 1899, p. 13, § 1; compiled R.C. & C.L., § 8460; C.S., § 9355; I.C.A., § 20-101; am. 1970, ch. 143, § 5, p. 425; am. 1971, ch. 331, § 1, p. 1299.]

Compiler's notes. Section 4 of S. L. 1970, ch. 143 is compiled as § 19-2604 and § 6 as § 20-209.

Cross ref. Courses of study prepared by state board of education, § 33-123.

Mental health facility for dangerously mentally ill prisoners, §§ 66-1301 — 66-1315.

Supreme Court reports distributed to library at state penitentiary, § 1-505.

Cited in: Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

Moot Issue.

Although in light of this section it would appear improper for the board of correction to

obtain custody and hold any offender at one of its institutions where the offender has not been both convicted and sentenced in respect to some charge, alleged illegality of the petitioners' incarceration on death row during the time period from March 18, 1983 to April 4, 1983, pending resentencing as ordered by the Supreme Court, was a moot issue after the death penalty was again imposed, and denial of petition for habeas corpus was proper. *Sivak v. State*, 112 Idaho 127, 730 P.2d 1047 (Ct. App. 1986).

Collateral References. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 1 et seq.

72 C.J.S., Prisons, § 1 et seq.

Prison conditions as amounting to cruel and unusual punishment. 51 A.L.R.3d 111.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape. 76 A.L.R.3d 658.

20-101A. Good conduct reduction of sentences. — Each person convicted of an offense against the state, which was committed prior to July 1, 1986, and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence beginning with the day on which the sentence starts to run as follows:

(1) Five (5) days for each month, if the sentence is not less than six (6) months and not more than one (1) year.

(2) Six (6) days for each month, if the sentence is more than one (1) year and less than three (3) years.

(3) Seven (7) days for each month, if the sentence is not less than three (3) years and less than five (5) years.

(4) Eight (8) days for each month if the sentence is not less than five (5) years and less than ten (10) years.

(5) Ten (10) days for each month, if the sentence is ten (10) years or more.

When two (2) or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of several sentences.

In addition, those inmates doing an outstanding job, may be awarded industrial or meritorious goodtime under rules adopted by the state board of correction, not to exceed five (5) days per month.

Inmates performing exceptionally meritorious or outstanding services under rules adopted by the state board of correction may be awarded a lump sum of goodtime. The number of days awarded may not exceed the regulatory maximum. [I.C., § 20-101A, as added by 1971, ch. 96, § 1, p. 208; am. 1972, ch. 30, § 1, p. 44; am. 1986, ch. 322, § 1, p. 789.]

Compiler's notes. Section 2 of S.L. 1972, ch. 30 declared an emergency. Approved February 28, 1972.

Cited in: *State v. Fowler*, 105 Idaho 642, 671 P.2d 1105 (Ct. App. 1983); *Balla v. Idaho State Bd. of Cors.*, 595 F. Supp. 1558 (D. Idaho 1984); *State v. Heistand*, 107 Idaho 218, 687 P.2d 1001 (Ct. App. 1984); *State v. Grob*, 107 Idaho 496, 690 P.2d 951 (Ct. App. 1984); *State v. Lawrence*, 107 Idaho 867, 693 P.2d 1069 (Ct. App. 1984); *State v. Martinez*, 109 Idaho 61, 704 P.2d 965 (Ct. App. 1985); *State v. Beltran*, 109 Idaho 196, 706 P.2d 85 (Ct. App. 1985); *State v. Thiemann*, 109 Idaho 535, 708

P.2d 940 (Ct. App. 1985); *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985); *State v. Puga*, 111 Idaho 874, 728 P.2d 398 (Ct. App. 1986); *State v. Reinke*, 111 Idaho 968, 729 P.2d 443 (Ct. App. 1986); *State v. Griffith*, 114 Idaho 95, 753 P.2d 831 (Ct. App. 1988); *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988); *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989); *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997); *Brandt v. State Comm'n For Pardons & Parole*, 135 Idaho 208, 16 P.3d 305 (Ct. App. 2000).

ANALYSIS

Due process.

Duration of fixed sentence.

Right to reductions.

Sentence.

—Improper.

—Proper.

—Review.

Due Process.

Where a statute such as this section permits an inmate to earn goodtime credits, the inmate has a liberty interest in the credits granted, pursuant to the Fourteenth Amendment, which prevents deprivation of the credits in absence of due process requirements. *Dallas v. Arave*, 129 Idaho 819, 933 P.2d 108 (Ct. App. 1997).

Where department provided defendant with notice and opportunity to be heard as required by the safeguards of procedural due process prior to forfeiting 365 days of his accumulated goodtime credits, but rather than taking advantage of the opportunity, defendant invoked his right against self-incrimination and remained silent there was no violation of substantive due process and such action was not fundamentally unfair because the jury in prosecution for criminal offense of escape determined he absconded from prison out of necessity to protect himself from danger of serious bodily harm. *Dallas v. Arave*, 129 Idaho 819, 933 P.2d 108 (Ct. App. 1997).

Duration of Fixed Sentence.

For purposes of appellate review, the duration of a fixed sentence is deemed to be the term of the sentence, less the formula reduction available for good conduct under this section. *State v. Rutherford*, 109 Idaho 1016, 712 P.2d 717 (Ct. App. 1985); *State v. Bishop*, 110 Idaho 689, 718 P.2d 602 (Ct. App. 1986); *State v. Cootz*, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

It is inappropriate for a judge to determine the length of a fixed sentence upon the assumption that it will be reduced by the discretionary "good time" available under this section for "inmates doing an outstanding job." *State v. Rosencrantz*, 110 Idaho 124, 714 P.2d 93 (Ct. App. 1986).

For the purpose of sentence review, the duration of confinement imposed by a fixed sentence is deemed to be its facial term less the credit available for good conduct under this section. *State v. Lee*, 111 Idaho 489, 725 P.2d 194 (Ct. App. 1986).

For the purpose of sentence review, the duration of confinement imposed by a fixed sentence is deemed to be the facial term of the sentence less the formula reduction for good conduct available as a matter of right under this section. *State v. Torres*, 112 Idaho 801, 736 P.2d 853 (Ct. App. 1987).

Right to Reductions.

Good conduct reductions are not automatic in every case, but the formula reductions prescribed by this section are available as a matter of right to inmates motivated to achieve them. *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct. App. 1983).

Sentence.

—Improper.

Where the record did not show that the defendant could never be safely returned to society on parole, the fixed life sentence for convictions of first degree burglary and sexual abuse of a child was inappropriate. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

—Proper.

A maximum sentence of a fixed period of five years where the actual period of imprisonment would be approximately three and two-third years, imposed where following plea negotiations, defendant who was initially charged with assault accompanied by intent to commit a serious felony and with attempted rape entered a plea of guilty of aggravated assault, was not an abuse of sentencing discretion where defendant entered residence with intent to commit burglary and upon confronting victim brandished a gun and threatened her with rape even though defendant had suffered a troubled childhood, the death of his mother, the contribution of alcohol to his behavior and had no prior felonies as an adult and did not physically harm the victim and had compassion when she became ill. *State v. Torres*, 112 Idaho 801, 736 P.2d 853 (Ct. App. 1987).

A fixed life sentence may be deemed reasonable if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society. *State v. Eubank*, 114 Idaho 635, 759 P.2d 926 (Ct. App. 1988).

—Review.

When reviewing a fixed sentence, the Court of Appeals treats the measure of confinement as the term imposed less statutory credit for good conduct allowed by this section. *State v. Santos*, 112 Idaho 1130, 739 P.2d 429 (Ct. App. 1987).

Because, with respect to sentences for crimes committed on or after July 1, 1986, the Legislature eliminated the formula reduction previously available as a matter of right under this section and in its place enacted a narrow system of "meritorious" sentence reduction, any postulated measure of confinement under a fixed sentence can no longer rest upon an assumption that the prisoner

will receive a "good time" credit; rather, as to crimes committed on or after July 1, 1986, the entire facial length of a fixed sentence must

be treated as the term of confinement for the purpose of appellate review. *State v. Amerson*, 113 Idaho 183, 742 P.2d 438 (Ct. App. 1987).

20-101B. Forfeiture of good conduct reduction. — Inmates who fail to observe faithfully the rules of the institution may have goodtime withheld or forfeited under rules adopted by the state board of correction.

Forfeited or withheld goodtime may only be restored by the board of correction or its authorized agent.

Such revocation or forfeiture shall not be made except upon a hearing upon the question of the infraction of the rules charged to such convicted person before the state board of correction or its authorized agent. [I.C., § 20-101B, as added by 1971, ch. 96, § 2, p. 208; am. 1976, ch. 32, § 1, p. 69.]

Compiler's notes. Section 3 of S.L. 1971, ch. 96 declared an emergency. Approved March 11, 1971.

Cited in: *State v. Miller*, 105 Idaho 838, 673 P.2d 438 (Ct. App. 1983).

ANALYSIS

Hearing.

—Due process.

Hearing.

Where department provided defendant with notice and opportunity to be heard as required by the safeguards of procedural due process prior to forfeiting 365 days of his accumulated goodtime credits, but rather than taking advantage of the opportunity defendant invoked his right against self-incrimination and remained silent, there was no violation of substantive due process and such action was not fundamentally unfair because the jury in prosecution for criminal

offense of escape determined he absconded from prison out of necessity to protect himself from danger of serious bodily harm. *Dallas v. Arave*, 129 Idaho 819, 933 P.2d 108 (Ct. App. 1997).

—Due Process.

Where the department properly informed defendant of the disciplinary offenses with which he was being charged and followed the proper procedures in proceeding against him and gave him an opportunity to be heard as required by this section, he could not claim that due process was not afforded to him because he voluntarily chose to remain silent at the hearing; therefore, magistrate's holding that department complied with due process and properly forfeited 365 days of defendant's accumulated goodtime credits for the disciplinary escape violation was proper. *Dallas v. Arave*, 129 Idaho 819, 933 P.2d 108 (Ct. App. 1997).

20-101C. Furlough — Conditions — Failure to return — Specifically authorized for funerals and accident or illness. — The state board of correction or its designee shall, in its discretion have the power to establish rules and regulations under which an inmate may be privileged to furlough but to remain while on such leave in the legal custody and under the control of the state board of correction.

Before authorizing the furlough of an eligible inmate, the board of correction or its designee shall have said inmate appear before such board or designee and shall interview said inmate. An inmate shall be placed on furlough only when there has been made:

(1) an administrative verification of the reason for which the inmate requests furlough;

(2) arrangements for supervision, maintenance and care while on furlough;

(3) verification that travel arrangements directly to and from the place of destination, with all expenses paid by the inmate or his family; provided

however, that in the case of an indigent inmate, said expenses may be satisfied from the inmate welfare fund;

(4) a determination of the leave duration, provided, however, that such leave may not exceed seventy-two (72) hours except in the case of a medical furlough for the purpose of diagnosis or treatment of a serious illness or injury;

(5) provision for signing a waiver of extradition;

(6) a determination and establishment in writing of any and all other conditions, terms and incidents requisite to such furlough;

(7) there are no detainers against said inmate; and

(8) said inmate has been classified to minimum custody for a minimum of six (6) months immediately prior to the granting of said furlough and has been recognized for meritorious performance by the board of correction or its delegated authority while so classified to minimum custody, except in the case of a medical furlough for diagnosis or treatment of a serious illness or injury. Medical furlough inmates may be classified to minimum custody for less than a six (6) month period and need not be recognized for meritorious performance.

Condition (8) need not be met when the inmate has been classified to minimum custody and has been released to one of the department of corrections's [correction's] community work centers.

The voluntary and wilful failure of any inmate to abide by the terms of said furlough or to return to the state penitentiary prior to or at the expiration of the time allowed for such furlough shall be considered an escape or attempt to escape, as the case may be, from the custody of the state board of correction and shall be punishable pursuant to section 18-2505, Idaho Code.

Furlough is authorized for diagnosis or treatment of a serious illness or injury, funerals, serious illness or accidents of the immediate family of the inmate, family visitation, to seek employment, and such other purposes that contribute to and promote a transition from confinement to the free society.

Immediate family is defined as a mother or father, brothers, or sisters, of the whole or halfblood, a wife or husband, or lawful issue.

The board of correction or its designee shall notify local law enforcement officials in the county where the inmate is to be furloughed a reasonable time prior to placing said inmate on furlough. Such notice shall be in writing, provided, however, that such notice may be oral if exigencies require it. Due consideration will be given to the law enforcement decision. [1971, ch. 166, § 1, p. 789; am. 1974, ch. 200, § 1, p. 1519; am. 1981, ch. 53, § 1, p. 81; am. 1995, ch. 34, § 1, p. 52.]

20-101D. Meritorious reduction of sentence. — (1) Each person convicted of an offense against the state committed on or after July 1, 1986, sentenced and confined in a state correctional facility for any term other than life, may be awarded a meritorious conduct reduction of their sentence by the director of the department of correction. Meritorious conduct reduction of the sentence may be awarded when an inmate completes an extraordinary act of heroism at the risk of his own life or for outstanding

service to the state of Idaho which results in the saving of lives, prevention of destruction or major property loss during a riot, or the prevention of an escape from a correctional facility. The award of a meritorious conduct reduction may be given under rules adopted by the Idaho board of correction. The number of days awarded may not exceed fifteen (15) days for each month sentenced.

(2) For each inmate sentenced for a crime committed on or after July 1, 1986, the director of the department of correction may withdraw a meritorious conduct reduction awarded pursuant to subsection (1) of this section according to rules of the board of correction. [I.C., § 20-101D, as added by 1986, ch. 322, § 2, p. 789.]

Compiler's notes. Section 1 of S.L. 1986, ch. 322 is compiled as § 20-101A.

Cited in: State v. Romero, 114 Idaho 92, 753 P.2d 828 (Ct. App. 1988); State v. Griffith, 114 Idaho 95, 753 P.2d 831 (Ct. App. 1988).

ANALYSIS

Duration of fixed sentence.

—Review.

Duration of Fixed Sentence.

—Review.

Because, with respect to sentences for crimes committed on or after July 1, 1986, the

Legislature eliminated the formula reduction previously available as a matter of right under § 20-101A and in its place enacted a narrow system of "meritorious" sentence reduction, any postulated measure of confinement under a fixed sentence can no longer rest upon an assumption that the prisoner will receive a "good time" credit; rather, as to crimes committed on or after July 1, 1986, the entire facial length of a fixed sentence must be treated as the term of confinement for the purpose of appellate review. State v. Amerson, 113 Idaho 183, 742 P.2d 438 (Ct. App. 1987).

20-102. Penitentiary permanent endowment fund. — (1) There is established in the state treasury the penitentiary permanent endowment fund. This fund is perpetually appropriated for the beneficiaries of the endowment. The fund shall be managed and invested by the endowment fund investment board according to law and the policies established by the state board of land commissioners. The fund principal shall forever remain intact. The fund shall be a permanent fund and shall consist of the following:

(a) Proceeds of the sale of lands granted to the state of Idaho by the United States government in the Idaho Admission Bill, 26 Stat. L. 215, ch. 656, known as penitentiary endowment lands, and lands granted in lieu thereof;

(b) Proceeds of royalties arising from the extraction of minerals on penitentiary endowment lands owned by the state; and

(c) Moneys allocated from the penitentiary earnings reserve fund.

(2) Proceeds from the sale of penitentiary endowment lands may first be deposited into the land bank fund established in section 58-133, Idaho Code, to be used to acquire other lands within the state for the benefit of the beneficiaries of the penitentiary endowment. If the land sale proceeds are not used to acquire other lands in accordance with section 58-133, Idaho Code, the land sale proceeds shall be deposited into the penitentiary permanent endowment fund along with any earnings on the proceeds.

(3) Earnings from the investment of the penitentiary permanent endowment fund shall be distributed according to the provisions of section 57-723A, Idaho Code. [I.C., § 20-102, as added by 1998, ch. 256, § 2, p. 825.]

Compiler's notes. Former section 20-102, which comprised 1905, p. 406, §§ 1, 2; continued in force R.C., § 17, subd. 69; reen. C.L., § 8469a; C.S., § 9367; I.C.A., § 20-201; amended 1994, ch. 180, § 11, p. 420, was repealed by S.L. 1998, ch. 256, § 1, effective July 1, 2000.

20-102A. Penitentiary earnings reserve fund. — (1) There is established in the state treasury the penitentiary earnings reserve fund. The fund shall be managed and invested by the endowment fund investment board according to law and the policies established by the state board of land commissioners. The fund shall consist of the following:

- (a) All earnings of the penitentiary permanent endowment fund;
- (b) Proceeds of the sale of timber growing upon penitentiary endowment lands;
- (c) Proceeds of leases of penitentiary endowment lands;
- (d) Proceeds of interest charged upon deferred payments on penitentiary endowment lands or timber on those lands; and
- (e) All other proceeds received from the use of penitentiary endowment lands and not otherwise designated for deposit in the penitentiary permanent endowment fund.

(2) Moneys shall be distributed out of the penitentiary earnings reserve fund only to support the beneficiaries of the penitentiary endowment, including distributions by the state board of land commissioners to the penitentiary permanent endowment fund and the penitentiary income fund; provided, that funds shall not be appropriated by the legislature from the penitentiary earnings reserve fund except to pay for administrative costs incurred managing the assets of the penitentiary endowment including, but not limited to, real property and monetary assets. [I.C., § 20-102A, as added by 1998, ch. 256, § 3, p. 825.]

20-103. Penitentiary income fund. — There is established in the state treasury the penitentiary income fund. The fund shall consist of all moneys distributed from the penitentiary earnings reserve fund and from other sources as the legislature deems appropriate. Moneys in the penitentiary income fund shall be used to benefit the beneficiaries of the penitentiary endowment and distributed to current beneficiaries of the penitentiary endowment pursuant to legislative appropriation. [I.C., § 20-103, as added by 1998, ch. 256, § 5, p. 825.]

Compiler's notes. Former section 20-103, which comprised 1905, p. 406, § 44; continued in force R.C., § 17, subd. 69; compiled and reen., C.L., § 8469b; C.S., § 9368; I.C.A., § 20-202, was repealed by S.L. 1998, ch. 256, § 4, effective July 1, 2000.

Section 6 of S.L. 1998, ch. 256 contained a repeal. Section 7 of S.L. 1998, ch. 256 is compiled as § 33-902.

20-104. Transfer of convicted foreign citizens or nationals under treaty. — If a treaty in effect between the United States and a foreign country provides for the transfer or exchange of convicted offenders to the country of which they are citizens or nationals, the governor may, on behalf of the state and subject to the terms of the treaty, authorize the director of the department of correction to consent to the transfer or exchange of offenders and take any other action necessary to initiate the participation of

this state in the treaty. [I.C., § 20-104, as added by 1986, ch. 77, § 1, p. 235.]

20-111. Prisoners in state penitentiary — Justifiable killing or wounding. — If any convict threatens personal injury to any officer, keeper or guard of the State Penitentiary or acts in such manner as may reasonably lead the officer, keeper or guard to believe his life or the life of any convict is in danger, or which leads the officer, keeper or guard, to believe the convict is attempting escape, then such officer, keeper or guard, may proceed forthwith to use any weapon he may have to enforce obedience, and if in so doing any convict shall be necessarily wounded or killed, the officer, keeper or guard is justified and shall be held guiltless. [1949, ch. 143, § 1, p. 251.]

CHAPTER 2

STATE BOARD OF CORRECTIONS

SECTION.

- 20-201. Department of correction created.
- 20-201A. Board created — Appointment — Nonpartisan — Terms — Vacancies — Delegation of authority.
- 20-202. Interim appointments — Chairman.
- 20-203. Removal of members — Grounds — Hearing and proceedings.
- 20-204. Political activity of board members or employees restricted.
- 20-205. Qualifications of board or board members.
- 20-206. Organization of board — Election of vice-chairman and secretary, terms.
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- 20-208. Salaries and expenses of board members.
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- 20-211. Records, funds and property of superseded agencies — Delivery to board of corrections [correction].

SECTION.

- 20-212. Rules — Authority of board.
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- 20-215. [Repealed.]
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- 20-225A. Payment for interstate compact application.
- 20-226. Records of prisoners.

SECTION.

- 20-227. Arrest of parolee, probationer or person under drug court supervision without warrant — Agent's warrant — Detention — Report to commission or court.
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- 20-238. Clothing and transportation to be furnished prisoners upon parole or final discharge.
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- 20-241A. Agreements for confinement of inmates.
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- 20-243. Delivery of convicted person to penitentiary or board — Copy of commitment — Receipt for delivery of prisoner.
- 20-244. Government and discipline of the correctional facility — Rules and regulations.
- 20-245. Offender labor on state and community service projects.
- 20-246. Penitentiary — Powers of board of correction.
- 20-247. Transfer of prisoner to federal penal or correctional institution.
- 20-248. Contract for care of transferred prisoner.
- 20-249. Transferred prisoner subject to terms of original sentence.

20-201. Department of correction created. — There is hereby created the department of correction which shall consist of the board of correction and the commission of pardons and parole. The department of correction shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of state government. [I.C., § 20-201, as added by 1999, ch. 311, § 4, p. 772.]

Compiler's notes. The words "this act" refer to S.L. 1927, ch. 29, which is codified as §§ 19-4501 — 19-4527.

Former § 20-201, as enacted by S.L. 1969, ch. 97, § 2, was amended and redesignated as § 20-201A by § 5 of S.L. 1999, ch. 311.

Another former § 20-201, which comprised S.L. 1947, ch. 53, § 1, p. 59; am. 1947, ch. 145, § 1, p. 343, was repealed by § 1 of S.L. 1969, ch. 97.

Section 3 of S.L. 1999, ch. 311 is compiled as § 20-212.

Section 6 of S.L. 1999, ch. 311, declared an emergency. Approved March 24, 1999.

Sec. to sec. ref. This chapter is referred to in § 20-803.

Cited in: Idaho Dep't of Corr. v. Anderson, 134 Idaho 680, 8 P.3d 675 (Ct. App. 2000).

20-201A. Board created — Appointment — Nonpartisan — Terms — Vacancies — Delegation of authority. — (1) There is hereby created a nonpartisan board of three (3) members to be known as the state board of correction, referred to in this chapter as the board, appointed by the

governor to exercise the duties imposed by law. The board shall be the constitutional board of correction prescribed by section 5, article X, of the constitution of the state of Idaho. Not more than two (2) members shall belong to the same political party. Any person appointed a member of the board shall hold office for six (6) years. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made.

(2) The board may transfer to the commission of pardons and parole any and all authority and power as it deems necessary to fulfill the duties, responsibilities and intent of this chapter and the other duties imposed upon it by law. [1969, ch. 97, § 2, p. 329; am. 1974, ch. 6, § 1, p. 28; am. and redesig. 1999, ch. 311, § 5, p. 772.]

Compiler's notes. This section was formerly compiled as § 20-201.

Section 2 of S.L. 1974, ch. 6 is compiled as § 20-210.

Section 6 of S.L. 1999, ch. 311, declared an emergency. Approved March 24, 1999.

Cited in: Ex parte Dalton, 72 Idaho 451, 243 P.2d 594 (1952); Forbush v. Thatcher, 78 Idaho 597, 309 P.2d 203 (1957); State v. Gee, 107 Idaho 991, 695 P.2d 376 (1985); Mellinger v. Idaho Dep't of Cors., 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

ANALYSIS

Applicability of rules of evidence.

Custody classification level.

Fees and costs.

State immunity.

Applicability of Rules of Evidence.

The Rules of Evidence applicable to a judicial proceeding need not be observed at a parole revocation hearing. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Custody Classification Level.

A pending probation violation claim by the State of Washington did not vest the Idaho courts with any special authority to consider the impact of that claim on defendant's custody classification level established by the Department of Corrections. *Swain v. State*, 122 Idaho 918, 841 P.2d 448 (Ct. App. 1992).

Fees and Costs.

Where inmate's petition alleged violations of due process at the correctional facility operated by the Department of Corrections, it would have been error for the district court to have awarded fees and costs against the department under § 12-117 since the award could have been made only under § 12-121. *Needs v. Idaho State Dep't of Cor.*, 115 Idaho

399, 766 P.2d 1280 (Ct. App. 1988).

Section 12-117 does not apply to actions in which the Board of Corrections is a party. *Needs v. Idaho State Dep't of Cor.*, 115 Idaho 399, 766 P.2d 1280 (Ct. App. 1988).

State Immunity.

The state Department of Corrections is part of the state and any judgment against the Department or its employees acting in their official capacities would be paid out of the state treasury; therefore, the Eleventh Amendment of the United States Constitution barred the inmates' actions against the prison officials in their official capacities. *Leer v. Murphy*, 844 F.2d 628 (9th Cir. 1988).

Collateral References. 59 Am. Jur. 2d, Pardon and Parole, § 1 et seq.

60 Am. Jur. 2d, Penal and Correctional Institutions, § 1 et seq.

67A C.J.S., Pardon and Paroles, § 1 et seq.

72 C.J.S., Prisons and Rights of Prisoners, § 1 et seq.

Right to notice and hearing upon revocation of pardon or parole. 29 A.L.R.2d 1074.

Pardon as affecting impeachment by proof of conviction of crime. 30 A.L.R.2d 893.

Habitual criminal statute, pardon as affecting consideration of earlier conviction in applying. 31 A.L.R.2d 1186.

Offenses in convictions covered by pardon. 35 A.L.R.2d 1261.

Provision of religious facilities for prisoners. 12 A.L.R.3d 1276.

Censorship of convicted prisoners' "legal" mail. 47 A.L.R.3d 1150.

Censorship of convicted prisoners' "nonlegal" mail. 47 A.L.R.3d 1192.

Prison conditions as amounting to cruel and unusual punishment. 51 A.L.R.3d 111.

Pardon as defense to disbarment of attorney. 59 A.L.R.3d 466.

20-202. Interim appointments — Chairman. — In the event of death, removal or resignation of any member of the board, the governor shall appoint some competent person to serve during the unexpired term.

The governor shall designate one (1) member of the board to serve as chairman. [1947, ch. 53, § 2, p. 59; am. 1998, ch. 270, § 1, p. 899.]

20-203. Removal of members — Grounds — Hearing and proceedings. — The governor may not remove any member of the board except for disability, inefficiency, neglect of duty or malfeasance in office. Before such removal the governor shall give such member a written copy of the charges against him and shall fix the time when he can be heard in his defense which shall not be less than ten (10) days thereafter. If such member shall be removed, the governor shall file, in the office of the secretary of state, a complete statement of all charges made against such member and his findings thereon, with a record of the proceedings. [1947, ch. 53, § 3, p. 59.]

Powers of Board.

The state board of correction is the body which has been expressly granted the control, direction and management of the peniten-

tiary of the state of Idaho. The courts do not have jurisdiction to supervise matters of ordinary prison discipline. *Mahaffey v. State*, 87 Idaho 228, 392 P.2d 279 (1964).

20-204. Political activity of board members or employees restricted. — The members of the board of correction and its officers and employees shall not, at the time of appointment nor during their incumbency of office, serve as the representative, officer, or employee of any political party. [1947, ch. 53, § 4, p. 59.]

20-205. Qualifications of board or board members. — In the selection of members of the original board, and thereafter as vacancies occur in the appointment of successor member, the governor so appointing shall, so far as same is possible, select the members on the basis of their general background in business and administration. [1947, ch. 53, § 5, p. 59; am. 1969, ch. 419, § 1, p. 1160.]

20-206. Organization of board — Election of vice-chairman and secretary, terms. — At the first meeting after they have qualified for office, the board shall proceed to organize by the election of one (1) of their members as a vice-chairman and the other as secretary. Such officers shall serve during the succeeding biennium. [1947, ch. 53, § 6, p. 59.]

20-207. Office of board at penitentiary — Meetings — Quorum — Majority vote. — The state board of correction shall maintain an office at the penitentiary and shall meet at such times and places as may be necessary for the conduct of its business. Meetings may be held at the call of the chairman or a majority of the board but in no event shall they meet less than quarterly. A majority of the board shall constitute a quorum for the transaction of business and no order of the board shall be valid unless concurred in by at least two (2) of its members. [1947, ch. 53, § 7, p. 59; am. 1969, ch. 97, § 3, p. 329.]

20-208. Salaries and expenses of board members. — Each member of the state board of correction shall be compensated as provided by section

59-509(h), Idaho Code. [1947, ch. 53, § 8, p. 59; am. 1951, ch. 217, § 1, p. 448; am. 1969, ch. 97, § 4, p. 329; am. 1980, ch. 247, § 5, p. 582.]

Compiler's notes. Sections 4 and 6 of S.L. 1980, ch. 247 are compiled as §§ 19-5203 and 20-210, respectively.

Cited in: *Shouse v. Ljunggren*, 792 F.2d 902 (9th Cir. 1986).

Collateral References. Liability for death

of or injury to prisoner. 46 A.L.R. 94; 50 A.L.R. 268; 61 A.L.R. 569.

Constitutionality of statutes in relation to treatment or discipline of convicts. 50 A.L.R. 104.

20-209. Control and management of correctional facilities and prisoners — Rules. — (1) The state board of correction shall have the control, direction and management of such correctional facilities as may be acquired for use by the state board of correction and all property owned or used in connection therewith, and shall provide for the care, maintenance and employment of all prisoners now or hereinafter committed to its custody.

(2) The state board of correction shall have the authority to enter into contracts with private prison contractors for the site selection, design, design/building, acquisition, construction, construction management, maintenance, leasing, leasing/purchasing, management or operation of private prison facilities or any combination of those services subject to the requirements and limitations set forth in section 20-241A, Idaho Code.

(3) The state board of correction shall have the authority to promulgate rules required by law or necessary or desirable to carry out all duties assigned to the department of correction pursuant to the provisions of chapter 8, title 20, Idaho Code, which authority shall include the power and duties to prescribe standards, rules and procedures for licensure of private prison contractors, to develop and provide, in conjunction with the department of administration, a uniform contract for use by local contracting authorities in contracting with private prison contractors, to review records and historical information of all prisoners proposed to be housed in private prison facilities and to approve or reject the housing of all prisoners, to monitor the status of insurance of private prison contractors, to approve suitable training programs for firearm certification for employees of private prison contractors and to approve suitable drug testing programs for prisoners housed with private prison contractors. All final decisions by the board shall be subject to review pursuant to the provisions and procedures of the administrative procedure act, chapter 52, title 67, Idaho Code.

(4) The state board of correction is authorized to provide medical and counseling services to those prisoners who have been exposed to the HIV (human immunodeficiency virus) which causes acquired immunodeficiency syndrome (AIDS) or who have been diagnosed as having contracted a human immunodeficiency viral disease.

(5) The state board of correction should provide educational and informational services to prisoners housed in Idaho and to its department employees in order to assure that the transmission of HIV within correctional facilities is diminished. [1947, ch. 53, § 9, p. 59; am. 1970, ch. 143, § 6, p. 425; am. 1988, ch. 110, § 1, p. 199; am. 1997, ch. 223, § 1, p. 655; am. 2001, ch. 335, § 12, p. 1177.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 5 of S.L. 1970, ch. 143 is compiled herein as § 20-101.

Section 2 of S.L. 1997, ch. 223 is compiled as § 20-241.

Sections 11 and 13 of S.L. 2001, ch. 335 are compiled as §§ 18-2507 and 20-212, respectively.

Cross ref. Courses of study and vocational training for inmates of penitentiary, education of prisoners, § 33-123.

Inmates of penal institutions as witnesses, examination in prison or removal to court, § 9-711.

Indeterminate sentence, § 19-2513.

Parole by court prior to sentence, § 19-2601 et seq.

Restoration of civil rights except political rights, § 18-310.

Venereal disease, duty to report, § 39-602.

Venereal diseases, examination and treatment of inmates, § 39-604.

Voting not permitted by inmates, § 34-403; Id. Const., Art. VI, § 3.

Cited in: *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955); *MaHaffey v. State*, 87 Idaho 228, 392 P.2d 279 (1964); *Burge v. State*, 90 Idaho 473, 413 P.2d 451 (1966); *State v. Reese*, 98 Idaho 347, 563 P.2d 405 (1977); *Killeen v. Vernon*, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

20-209A. Computation of term. — When a person is sentenced to the custody of the board of correction, his term of confinement begins from the day of his sentence. A person who is sentenced may receive credit toward service of his sentence for time spent in physical custody pending trial or sentencing, or appeal, if that detention was in connection with the offense for which the sentence was imposed. The time during which the person is voluntarily absent from the penitentiary, jail, facility under the control of the board of correction, or from the custody of an officer after his sentence, shall not be estimated or counted as a part of the term for which he was sentenced. [I.C., § 20-209A, as added by 1970, ch. 143, § 7, p. 425.]

Compiler's notes. Sections 6 and 8 of S.L. 1970, ch. 143 are compiled as §§ former 20-209 and 20-223 respectively (now repealed).

Escapees.

It is entirely illogical that a prisoner who

Prison Disciplinary Action.

Numerous pro se motions, including motions for a new trial and bond pending appeal, and several handwritten letters submitted to the trial court during the pendency of defendant's direct appeal were not independent causes of action warranting prison disciplinary action against him under § 20-209E, proscribing the filing of frivolous or malicious claims. *State v. Broadway*, 138 Idaho 151, 59 P.3d 322 (Ct. App. 2002).

Opinions of Attorney General. The state is responsible for medical costs incurred by state detention facilities for the examination and treatment of venereal disease, including the detection and treatment of prisoners found to be infected with AIDS. OAG 87-7.

With regard to inmates who are HIV positive, or who have ARC or AIDS, the duty of the Idaho Department of Corrections to inmates and staff is to take reasonable measures to ensure the safety of both. No greater liability is created by reasonably restricting access to patient information. In fact, under some circumstances, failure to protect the confidentiality of such information could expose the department to liability. OAG 89-6.

Collateral References. Federal constitutional and statutory claims by HIV-positive inmates as to medical treatment or conditions of confinement. 162 A.L.R. Fed. 181.

escapes from incarceration should be permitted accrual of time toward his sentences while he is at large. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

20-209B. Duty to control disturbances at state penitentiary. — It shall be the primary duty of the state director of correction, or his designee, to prevent, control and suppress all riots, escapes, affrays and insurrections at the state penitentiary or other place maintained by the state board of correction which come to his knowledge, and to control and suppress all attempts to riot or escape.

The director of correction, or his designee, shall be primarily responsible for all security measures to be taken at the time of any riot, escape, affray or insurrection, or attempts to commit the same, at the state penitentiary or other place under the control of the state board of correction.

Any county sheriff, deputy sheriff or any person so acting, and all other law enforcement officers, shall be subject to the authority herein conferred upon the director of correction, or his designee, and shall be subject to his direction and control during any riots, escapes, affrays, insurrections, or attempts to commit the same, at the state penitentiary [penitentiary] or other place maintained by the state board of correction.

Nothing in this act shall preclude the use of any county sheriff or other law enforcement officers by the director of correction during any such existing emergency. If at any such time the director of correction shall find need for the assistance of any county sheriff or other law enforcement officers, the sheriff and such other officers may respond and render assistance at the direction of the director of correction. [I.C., § 20-209B, as added by 1973, ch. 169, § 1, p. 358.]

Compiler's notes. The bracketed word "penitentiary" was inserted by the compiler.

20-209C. Authority to designate employees as peace officers. —

All employees of the state board of correction who receive certification from the Idaho peace officers standards and training advisory council shall have the authority given by statute to peace officers of the state of Idaho in accordance with the provisions of section 19-510A, Idaho Code. The state board of correction shall have the additional authority to designate other classified employees to act as peace officers when engaged in transportation of prisoners or apprehension of prisoners or wards who have escaped, or apprehension and arrest of persons who are suspected of having violated the terms and conditions of their probation or parole. [I.C., § 20-209B, as added by 1973, ch. 170, § 2, p. 359; am. and renumbered, 1979, ch. 205, § 1, p. 588; am. 1980, ch. 99, § 1, p. 219.]

Compiler's notes. Section 1 of S.L. 1973, ch. 170 is compiled as § 19-510A.

Sec. to sec. ref. This section is referred to in § 19-510A.

20-209D. Forfeiture of contraband property or money found in possession of inmates. — The state board of correction, or its designee, shall have the authority to confiscate contraband money found in the possession of the inmates and thereafter deposit the money in the department of correction receipts account, and to dispose of other contraband property found in possession of inmates by donation to a nonprofit organization. [I.C., § 20-209D, as added by 1979, ch. 205, § 2, p. 588; 1983, ch. 223, § 1, p. 618; am. 1989, ch. 213, § 1, p. 522.]

Compiler's notes. Section 2 of S.L. 1983, ch. 223 is compiled as § 20-409.

20-209E. Prison disciplinary action for frivolous or malicious court proceedings. — (1) In any action, whether filed in state, federal or administrative court, in which a prisoner submits a frivolous or malicious claim, or knowingly testifies falsely or otherwise knowingly presents false evidence or information to the court, the prisoner may be subject to prison disciplinary action. Such disciplinary action may be initiated upon the court's finding that:

- (a) The prisoner has filed a claim that is frivolous or malicious;
- (b) The prisoner filed a claim solely to harass the party;
- (c) The prisoner has knowingly testified falsely or otherwise knowingly submitted false evidence or information to the court; or
- (d) The prisoner has committed a fraud upon the court.

(2) In the absence of a finding by the court under subsection (1) of this section, and upon review and recommendation by the office of the attorney general, a disciplinary hearing may be held by the appropriate authority at the prison, pursuant to section 5, article X of the constitution of the state of Idaho, to determine whether the prisoner has filed a claim that is malicious or intended solely to harass the party, or has testified falsely or otherwise presented false evidence or information to the court.

(3) Upon a finding of guilt under either subsection (1) or (2) of this section, the prisoner shall be subject to prison disciplinary detention and loss of privileges consistent with established prison disciplinary procedures. [I.C., § 20-209E, as added by 1996, ch. 420, § 3, p. 1398.]

Compiler's notes. Sections 2 and 4 of S.L. 1996, ch. 420 are compiled as §§ 19-4902 and 20-628, respectively.

20-209F. Warrants for certain fugitives. — (1) The director of the department of correction or his designee shall have the authority to apply to the magistrates division of the district court of Ada county for a warrant for the arrest, detention and return to custody of any person committed to the custody of the department of correction under a judgment of conviction who, prior to satisfying the full term of his judgment of conviction and sentence, has either:

- (a) Escaped or absconded from the custody or supervision of the department; or
- (b) Been released for any reason by the department or by any law enforcement agency, department of correction or other agency in this state or another state.

(2) The magistrate shall issue a warrant upon submission by the director or his designee of an affidavit that:

- (a) Identifies the person sought;
- (b) Demonstrates that such person has been committed to the custody of the department of correction under a judgment of conviction; and
- (c) Demonstrates that, prior to satisfying the full term of his judgment of conviction and sentence, the person sought has either:

- (i) Escaped or absconded from the custody or supervision of the department; or

(ii) Been released for any other reason by the department or by any law enforcement agency, department of correction or other agency in this state or another state.

(3) Any person who is arrested and detained pursuant to this section shall be ineligible for bond, bail or release on his own recognizance.

(4) Any person arrested and detained pursuant to this section shall have the right to a hearing to confirm that:

(a) He is the person identified in the warrant; and

(b) An unsatisfied portion of his judgment of conviction and sentence remains to be served.

(5) A warrant issued pursuant to this section shall remain in effect until:

(a) The warrant is quashed by order of a court;

(b) The person identified in the warrant is returned to the custody of the department of correction; or

(c) The sentence of the person identified in the warrant is otherwise deemed satisfied.

(6) The issuance of a warrant pursuant to this section shall not negate or interfere with the issuance of warrants under any other provision of law.

(7) A warrant issued pursuant to this section shall be sufficient for any peace officer to arrest, detain and return to the custody of the department of correction any person described in the warrant. It shall be the duty of all peace officers to execute the warrant in the same manner as ordinary process and to return any person arrested pursuant to this section to the custody of the department of correction.

(8) A person who is detained pursuant to a warrant issued under this section may apply for an order quashing the warrant. An action to quash a warrant issued under this section may be brought in Ada county, Idaho or in the county in Idaho in which a person arrested under such a warrant is detained. A warrant issued under this section shall be quashed upon a showing that the person sought or detained is not the person identified in the warrant or that the person's sentence has been completed or has otherwise been deemed satisfied. [I.C., § 20-209F, as added by 2002, ch. 130, § 2, p. 360.]

Compiler's notes. Section 1 of S.L. 2002, ch. 130 is compiled as § 19-4516.

20-210. Commission of pardons and parole — Appointment — Qualifications — Terms — Salary — Staff. — The governor shall appoint a state commission of pardons and parole, each member of which shall be subject to the advice and consent of the senate, in this chapter referred to as the commission, which shall succeed to and have all rights, powers and authority of said board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho.

The commission shall be composed of five (5) members. The members shall serve at the pleasure of the governor and not more than three (3) members shall be from any one (1) political party.

The members of the commission shall be appointed for the purposes of organization as follows: Members on the commission on the effective date of

this act, shall serve out the remainder of their terms; thereafter, as members' terms expire, the governor shall reappoint them or appoint new members to serve terms of three (3) years; vacancies in the commission for unexpired terms shall be by appointment by the governor for the remainder of the term and all appointees may be reappointed.

The commission and the board may meet as necessary to exchange such information to enable each to effectively carry out their respective duties.

The commission shall meet at such times and places as determined to be necessary and convenient, or at the call of the executive director and in any event no less than quarterly.

The members shall be compensated as provided by section 59-509(i), Idaho Code, when attending quarterly meetings conducted at a date and time separate from a hearing session or other meetings approved by the executive director. The members shall receive compensation of one hundred fifty dollars (\$150) per member per day when conducting parole, commutation, pardon, revocation or other hearings, and shall be reimbursed for actual and necessary expenses subject to the limitations provided in section 67-2008, Idaho Code.

The governor will liberally allow the reasonable payment for services of such technical and professional advice and consultation as the commission may require. The governor shall appoint the executive director for the commission. The executive director shall be the full-time employee who shall report to, serve at the pleasure of, and be compensated as determined by the governor. The executive director shall be the official representative for the commission, shall be responsible for the managing and administration of daily commission business and shall schedule hearing sessions at times convenient to the members of the commission. For each scheduled session, the executive director shall designate one (1) of the members of the commission as the presiding officer for conducting the hearings. The executive director may hire such staff and employees as are approved by the governor. The executive director shall also have such other duties and responsibilities as the governor shall assign. [1947, ch. 53, § 10, p. 59; am. 1969, ch. 97, § 5, p. 329; am. 1974, ch. 6, § 2, p. 28; am. 1980, ch. 247, § 6, p. 582; am. 1991, ch. 166, § 1, p. 406; am. 1994, ch. 171, § 1, p. 382; am. 1998, ch. 355, § 1, p. 1112; am. 1999, ch. 311, § 1, p. 772.]

Compiler's notes. Section 1 of S.L. 1974, ch. 6 is compiled as § 20-201A.

Sections 5 and 7 of S.L. 1980, ch. 247 are compiled as §§ 20-208 and 21-134, respectively.

Section 2 of S.L. 1994, ch. 171 is compiled as § 20-213A.

Section 2 of S.L. 1999, ch. 311 is compiled as § 59-904.

Section 6 of S.L. 1999, ch. 311 declared an emergency. Approved March 24, 1999.

The phrase "effective date of this act," in the third paragraph of this section, refers to S.L. 1999, ch. 311, § 1, effective March 24, 1999.

Sec. to sec. ref. This section is referred to in § 19-4213.

Cited in: State v. Kingsley, 99 Idaho 868,

590 P.2d 1014 (1979); State v. Wilson, 105 Idaho 669, 672 P.2d 237 (Ct. App. 1983); State v. Snapp, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

ANALYSIS

Commission.

—Powers.

Powers of board.

Commission.

—Powers.

The Commission of Pardons and Paroles had authority to add the intensive supervision program conditions to the defendant's parole without violating the separation of

powers doctrine of Const., Art. 2, § 1. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

When the Commission of Pardons and Parole is exercising the parole function, as distinguished from its commutation and pardoning powers, it is exercising powers "delegated to it by the board." *Carman v. State*, Comm'n of Pardons & Parole, 119 Idaho 642, 809 P.2d 503 (1991).

Powers of Board.

The board of pardons, created by the Constitution, has power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, and the governor has the power to grant respites and reprieves. *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957).

Opinions of Attorney General. By statute, a majority of the Commission of Pardons and Parole must vote in favor of an inmate parole application before parole can be

granted. If two of the five commissioners disqualify themselves, the remaining three must act unanimously in favor of the release. OAG 83-13.

As a statutory entity with authority to make decisions concerning paroles, pardons and commutations, the Commission of Pardons and Parole is subject to the Open Meeting Law and is required to open all meetings to the public except those conducted in executive session. OAG 85-9.

As to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

20-211. Records, funds and property of superseded agencies — Delivery to board of corrections [correction]. — From and after the taking effect of this act, the state board of correction shall succeed to and be in possession and control of all records, accounts, books, papers, equipment, supplies, funds, and other property, real and personal, in possession of or under the control of any office, board, commission, agency, deputy or employee herein abolished or superseded. Immediately after notice of the appointment, qualification, and organization of the state board of correction, the director of correction and every other state officer or employee then having in his possession or under his control any property, real or personal, any records, and funds of whatever kind or character for the use and benefit of the penitentiary or the administration thereof, shall proceed to prepare and within ten (10) days thereafter to submit a full and complete inventory of all property and records so held to said board of correction, together with possession of said records and property as said board of correction shall direct. [1947, ch. 53, § 11, p. 59; am. 1974, ch. 6, § 3, p. 28.]

Compiler's notes. As enacted the section heading of this section read, "Records, funds and property of superseded agencies, delivery to board of corrections."

The words "this act" refer to S.L. 1947, ch. 53, p. 59, compiled as §§ 20-202 — 20-209, 20-210 — 20-213, 20-214, 20-216, 20-218 — 20-222, 20-224, 20-226, 20-227 — 20-228, 20-230, 20-232 — 20-237, 20-238 — 20-241, 20-242, 20-243 — 20-245.

Section 4 of S.L. 1974, ch. 6 is compiled as § 20-214.

Commutation of Sentences.

Under Art. 4, § 7 of the Idaho Constitution, this section, and § 20-213, the Board of Correction, acting through the Commission of Pardons and Parole, has the power to commute fixed sentences. *State v. Storey*, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

20-212. Rules — Authority of board. — (1) The state board of correction shall make all necessary rules to carry out the provisions of this chapter not inconsistent with express statutes or the state constitution and to carry out those duties assigned to the department of correction pursuant to the provisions of chapter 8, title 20, Idaho Code. The board shall fix the

time and place of meetings, the order of business, the form of records to be kept, the reports to be made, and all other rules necessary to the efficient management and control of the state penitentiary and all properties used in connection therewith. All rules of the board shall be subject to review of the legislature pursuant to sections 67-454, 67-5291 and 67-5292, Idaho Code, but no other provisions of chapter 52, title 67, Idaho Code, shall apply to the board, except as otherwise specifically provided by statute. When making rules required by this section, the board or the department shall submit the rules to the office of the state administrative rules coordinator, in a format suitable to the office of the state administrative rules coordinator as provided in section 67-5202, Idaho Code, and the board or department shall pay all the fees provided in section 67-5205, Idaho Code. The office of the state administrative rules coordinator is authorized and shall publish the board or department's rules in the administrative bulletin. Additionally, whenever the board or department desires to amend, modify or repeal any of its rules, it shall follow the procedure provided in this section. All rules, or the amendment or repeal of rules shall be effective thirty (30) days after the date of publication by the office of the administrative rules coordinator. If the board determines that the rules need to be effective at a sooner date, they shall issue a proclamation indicating that the public health, safety and welfare is in jeopardy and, if the governor agrees, the rules shall be effective upon the governor signing the proclamation.

(2) "Rule" as used in this section means the whole or a part of the board of correction or department of correction's statement of general applicability that has been promulgated in compliance with the provisions of this section and that implements, interprets or prescribes:

(a) Law or policy; or

(b) The procedure or practice requirements of the board or department. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:

(i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or

(ii) Declaratory rulings issued pursuant to statute or the board's rules; or

(iii) Intra-department memoranda; or

(iv) Any written statements given by the department or board which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

(3) At the same time that the proclamation of rulemaking is filed with the coordinator, the board or department shall provide the same notice, accompanied by the full text of the rule under consideration in legislative format, as well as a statement of the substance of the intended action, to the director of legislative services. If the rulemaking is based upon a requirement of federal law or regulation, a copy of that specific federal law or regulation shall accompany the submission to the director of legislative services. The director of legislative services shall analyze and refer the material under consideration to the germane joint subcommittee created in section 67-454, Idaho Code.

(4) The board or department shall prepare and deliver to the germane joint subcommittee a statement of economic impact with respect to a rule if the germane joint subcommittee files a written request with the board or department for such a statement. The statement shall contain an evaluation of the costs and benefits of the rule, including any health, safety, or welfare costs and benefits. The adequacy of the contents of the statement of economic impact is not subject to judicial review. [1947, ch. 53, § 12, p. 59; am. 1999, ch. 311, § 3, p. 772; am. 2000, ch. 228, § 1, p. 641; am. 2001, ch. 335, § 13, p. 1177.]

Compiler's notes. Sections 2 and 4 of S.L. 1999, ch. 311 are compiled as §§ 59-904 and 20-201, respectively.

Section 12 of S.L. 2001, ch. 335 is compiled as § 20-209.

Section 6 of S.L. 1999, ch. 311 declared an emergency. Approved March 24, 1999.

Section 2 of S.L. 2000, ch. 228 declared an

emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in § 9-340B.

Cited in: Mellinger v. Idaho Dep't of Cors., 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988); Waggoner v. State, 121 Idaho 758, 828 P.2d 321 (Ct. App. 1991).

20-213. Meetings as state commission of pardons and paroles — Notice, publication, contents. — The commission shall meet at such times and places as it may prescribe, but not less than quarterly. If applications for pardon or commutation are scheduled to be considered at such meeting, notice shall be published in some newspaper of general circulation at Boise, Idaho, at least once a week for four (4) consecutive weeks, immediately prior thereto. Such notices shall list the names of all persons making application for pardon or commutation and a copy of such notice shall immediately, upon the first publication thereof, be mailed to each prosecuting attorney of any county from which any such person was committed to the penitentiary, and provided further that the commission may in its discretion consider but one (1) application for pardon or commutation from any one (1) person in any twelve (12) month period. [1947, ch. 53, § 13, p. 59; am. 1951, ch. 118, § 1, p. 273; am. 1969, ch. 419, § 2, p. 1160; am. 1980, ch. 297, § 1, p. 768.]

Compiler's notes. Section 2 of S.L. 1980, ch. 297 is compiled as § 20-216.

Cross ref. No fine or forfeiture shall be remitted, and no commutation or pardon granted, except by a decision of a majority of the board after a full hearing in open session. The proceedings and decision shall be reduced to writing, with the dissent of any member, and filed with the papers in the office of the secretary of state, Const., Art. 4, § 7.

Notice of hearing must be published for four weeks in some newspaper of general circulation, Const., Art. 4, § 7.

The legislature shall prescribe the sessions and regulate the proceedings of the board of pardons, Const., Art. 4, § 7.

Cited in: State v. Snapp, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

Commutation of Sentences.

Under Art. 4, § 7 of the Idaho Constitution, § 20-211 and this section, the Board of Correction, acting through the Commission of Pardons and Parole, has the power to commute fixed sentences. State v. Storey, 109 Idaho 993, 712 P.2d 694 (Ct. App. 1985).

DECISIONS UNDER PRIOR LAW

Powers.

Board of pardons is a branch of the executive department of the state government, and its powers and prerogatives, as such, are

those of granting clemency to convicted prisoners, and it has no power to increase or extend penalties or punishments, imposed by judgment of the courts. In re Prout, 12 Idaho

494, 86 P. 275, 5 L.R.A. (n.s.) 1064, 10 Ann. Cas. 199 (1906).

Board of pardons may attach such conditions as they see fit to a pardon, commutation, or parole, so long as they are not immoral, illegal, or impossible of performance, provided they are to be kept and performed or complied with during the term for which prisoner was sentenced; but they cannot require convict, who has broken his parole, to undergo imprisonment after the expiration of the time fixed by the judgment of conviction for the termination of such imprisonment, by requiring him to serve an additional time equal to that during which he was out on parole. In re Prout, 12 Idaho 494, 86 P. 275, 5 L.R.A. (n.s.) 1064, 10 Ann. Cas. 199 (1906).

Opinions of Attorney General. A commutation hearing on inmates with the death sentence may be conducted prior to reprieve by the governor. OAG 84-8.

The Commission of Pardons and Paroles may not conduct a commutation hearing absent a petition submitted by the inmate or on behalf of the inmate. OAG 84-8.

As a statutory entity with authority to make decisions concerning paroles, pardons and commutations, the Commission of Par-

dons and Parole is subject to the Open Meeting Law and is required to open all meetings to the public except those conducted in executive session. OAG 85-9.

As to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

The Idaho Commission for Pardons and Parole does have the power to commute a sentence during a fixed term under the Unified Sentencing Act. OAG 94-3.

Collateral References. Power of administrative officers to transfer inmates to penitentiary. 95 A.L.R. 1455.

Parole of prisoners, or discharge of parolees, statute conferring power upon administrative body in respect to, as unconstitutional infringement of power of executive. 143 A.L.R. 1488.

20-213A. Compliance with open meeting law — Executive sessions authorized — Report required. — (1) All meetings of the commission of pardons and parole shall be held in accordance with the open meeting law as provided in chapter 23, title 67, Idaho Code, except:

(a) Deliberations and decisions concerning the granting, revoking, reinstating or refusing of paroles, or the granting or denying of pardons or commutations, may be made in executive session; and

(b) Votes of individual members in arriving at the parole, pardon or commutation decisions shall not be made public, provided that the commission shall maintain a record of the votes of the individual members as required in subsection (2) of this section.

(2) A written record of the vote to grant or deny parole, pardon or commutation, by each commission member in each case reviewed by that member shall be produced by the commission. The record produced by the commission pursuant to this section shall be kept confidential and privileged from disclosure, provided the record shall be made available, upon request, to the governor and the chairman of the senate judiciary and rules committee and the chairman of the house of representatives judiciary, rules and administration committee, for all lawful purposes. Distribution of the report by a commissioner or an employee of the executive director to any person not specifically listed in this section shall be a misdemeanor.

(3) Nothing contained in this section shall prevent any person from obtaining the results of any parole, pardon or commutation action by the commission without reference to the manner in which any member voted, and the commission shall make such information public information.

(4) Nothing contained herein shall prevent the executive director for the commission or designated staff of the executive director from attending any meeting including an executive session of the commission of pardons and parole.

(5) Nothing contained herein shall prevent the governor and chairman of the senate judiciary and rules committee and the chairman of the house of representatives judiciary, rules and administration committee from attending any meeting including an executive session of the commission of pardons and parole. [I.C., § 20-213A, as added by 1986, ch. 59, § 1, p. 167; am. 1988, ch. 29, § 1, p. 37; am. 1990, ch. 213, § 14, p. 480; am. 1992, ch. 278, § 1, p. 854; am. 1994, ch. 171, § 2, p. 382; am. 2000, ch. 362, § 1, p. 1199.]

Compiler's notes. Section 2 of S.L. 1986, ch. 59 is compiled as § 67-2345.

Sections 13 and 15 of S.L. 1990, ch. 213 are compiled as §§ 19-1112 and 20-226, respectively.

Sections 1 and 3 of S.L. 1994, ch. 171 are compiled as §§ 20-210 and 20-228, respectively.

Section 3 of S.L. 1986, ch. 59 declared an emergency. Approved March 19, 1986.

Section 111 of S.L. 1990, ch. 213 as

amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

Section 2 of S.L. 1992, ch. 278 provided that the act would become effective July 1, 1993.

Sec. to sec. ref. This section is referred to in 9-340B.

Cited in: *Acheson v. Klauser*, — Idaho —, 75 P.3d 210 (Ct. App. 2003).

20-214. Assistants and officers. — The state board of correction shall have power and authority to employ, to specify the training, and to fix the duties of such assistants, officers and other persons necessary for the proper and efficient administration of the department of correction and the property used in connection therewith, for the administration of the parole and probation system, and generally for the carrying out of the provisions of this act, subject to the provisions of chapter 53, title 67, Idaho Code. [1947, ch. 53, § 14, p. 59; am. 1974, ch. 6, § 4, p. 28; am. 2001, ch. 16, § 1, p. 20.]

Compiler's notes. As enacted by S.L. 1974, ch. 6, this section contained a heading which read, "Assistants, officers and guards — Employment competitive examinations, qualifications, compensation." The subject matter of the latter portion of the heading

was deleted by the 1974 amendment.

Sections 3, 5, of S.L. 1974, ch. 6 are compiled as §§ 20-211, 20-218, respectively.

Cited in: *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

20-215. Chairman of board succeeding to powers and duties of warden — Powers and duties. [Repealed.]

Compiler's notes. This section, which comprised S.L. 1947, ch. 53, § 15, p. 59; am.

1967, ch. 364, § 1, p. 1052, was repealed by S.L. 1969, ch. 419, § 3.

20-216. Board — Powers and duties — Records, reports and statistics. — The board shall keep a record of and require reports from all persons on parole or probation and enforce observance of rules and regulations for parole or probation established by the commission or the courts. It shall prepare and publish reports and statistics relating to probation and parole and it shall submit to the governor, at such times as the governor may direct, but at least annually, a full and complete report of the board and its

agents, showing the disposition of all cases coming before the board or the commission and such additional information relating thereto as the governor may request. [1947, ch. 53, § 16, p. 59; am. 1969, ch. 419, § 4, p. 1160; am. 1980, ch. 297, § 2, p. 768.]

Compiler's notes. Sections 1 and 3 of S.L. 1980, ch. 297 are compiled as §§ 20-213 and 20-218, respectively.

20-217. Vice-chairman, powers and duties — Consulting psychiatrist for state institutions, expenses and per diem. [Repealed.]

Compiler's notes. This section, comprising S.L. 1947, ch. 53, § 17, p. 59, was repealed by S.L. 1969, ch. 419, § 5.

20-217A. Appointment of director — Salary — Powers and duties. — The board shall appoint a director of correction, referred to in this chapter as the director, of the Idaho state penitentiary whose salary shall be determined and set by the board. The director shall be the chief administrative officer for the board and business manager of the penitentiary and the properties used in connection therewith. The director shall assume all the authority, powers, functions and duties as may be delegated to him by the board. [I.C., § 20-217A, as added by 1967, ch. 364, § 2, p. 1052; am. 1969, ch. 97, § 6, p. 329.]

Compiler's notes. Section 7 of S.L. 1969, ch. 97 declared an emergency. Approved March 7, 1969.

20-218. Annual reports of receipts and expenditures. — The state board of correction shall annually submit to the governor and the state budget officer a full, true, and correct report of all moneys received and expended by it for correctional services. [1947, ch. 53, § 18, p. 59; am. 1974, ch. 6, § 5, p. 28; am. 1980, ch. 297, § 3, p. 768.]

Compiler's notes. Sections 4, 6 of S.L. 1974, ch. 6 are compiled as §§ 20-214, 20-234, respectively. Section 2 of S.L. 1980, ch. 297 is compiled as § 20-216.

20-219. Probation and parole supervision. — The state board of correction shall be charged with the duty of supervising all persons convicted of a felony placed on probation or released from the state penitentiary on parole, and all persons convicted of a felony released on parole or probation from other states and residing in the state of Idaho; of making such investigations as may be necessary; of reporting alleged violations of parole or probation in specific cases to the commission or the courts to aid in determining whether the parole or probation should be continued or revoked and of preparing a case history record of the prisoners to assist the commission or the courts in determining if they should be

paroled or should be released on probation. [1947, ch. 53, § 19, p. 59; am. 1980, ch. 297, § 4, p. 768; am. 1993, ch. 101, § 2, p. 254.]

Compiler's notes. Section 6 of S.L. 1980, ch. 297 is compiled as § 20-223.

Section 5 of S.L. 1980, ch. 297 repealed former § 20-223.

Section 1 of S.L. 1993, ch. 101 is compiled as § 19-2521.

Cited in: *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975); *Wilson v. State*, 133 Idaho 814, 993 P.2d 1205 (Ct. App. 2000).

ANALYSIS

Action against probation officer.

Conditions of parole.

—Reasonable.

Obtaining evidence of parole violation.

Recommendations of board.

Revocation of parole.

Supervision of parolees.

Action Against Probation Officer.

Where a motorcyclist was injured in a collision with a drunk driver who was on probation for driving under the influence of alcohol, the motorcyclist had a cause of action against the driver's probation officer whose negligent supervision of the driver foreseeably created a potential for harm to those motorists whom the driver would encounter on the state's highways. *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

Conditions of Parole.

—Reasonable.

The intensive supervision program conditions of parole authorizing warrantless searches, requiring the payment of fees to defray costs of supervision, restricting the use of alcohol, and establishing a curfew and geographic restrictions were reasonable, were possible to perform, and had an acceptable aim toward rehabilitation. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Obtaining Evidence of Parole Violation.

Although the state laboratory's confirmation of the urine test may have been sufficient to satisfy a judge, probation authorities were not precluded from gathering additional evidence of use or possession of a controlled substance; therefore, the probation officer's nonconsensual, warrantless search of the res-

idence was reasonably related to confirming the suspected controlled substances violation, and the district court did not err by refusing to suppress the evidence seized during the search. *State v. Molina*, 113 Idaho 449, 745 P.2d 1070 (Ct. App. 1987).

Recommendations of Board.

Although only the Commission for Pardons and Parole may impose substantive, rehabilitative conditions of parole, the Board of Corrections may recommend substantive conditions, and the Commission may delegate to its executive director the authority to act in its behalf in approving the Board's recommended parole conditions. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Revocation of Parole.

The Commission for Pardons and Parole's act of revoking the defendant's parole for violating conditions recommended by the Board of Corrections and approved by the Commission's executive director could be inferred as a ratification of the director's approval. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Supervision of Parolees.

This section when read in connection with § 20-301(2) can only mean that the legislature intended that the board of corrections would supervise parolees from Idaho penitentiary who remain in Idaho. *Pritchard v. State*, 115 Idaho 111, 765 P.2d 136 (1988).

As long as defendant was released, the department of correction had the duty of supervising him, and the parole supervision agreement he signed upon transferring to Idaho from Oregon was still in effect; even though on February 22, 1999, the Oregon authorities suspended defendant's parole, when defendant arrived at the probation and parole office on February 24, 1999, he was still under the department's supervision, and, pursuant to the parole supervision agreement, the Idaho probation and parole officers had authority to demand that defendant produce a urine sample for analysis, and to search defendant's vehicle. *State v. Fuller*, 138 Idaho 60, 57 P.3d 771 (2002).

20-219A. Impersonating a probation/parole officer, a presentence investigator or correctional officer — Official badge and identification card. — (1) Any person who for himself or as an agent or representative of another in this state who shall unlawfully exercise or attempt to exercise the functions of, or hold themselves out to anyone as, a

probation/parole officer, a presentence investigator or correctional officer, whether acting in his own behalf as an official of the court or correction, or as the authorized or unauthorized agent or representative of another, is punishable by a fine not exceeding five thousand dollars (\$5,000) or imprisonment in the county jail not exceeding one (1) year, or both.

(2) It is a misdemeanor for any person who is not authorized and commissioned by the director of correction, to wear, exhibit or display in public an official badge, official uniform of a correctional officer, or identification card of the department of correction of the state of Idaho, and is punishable by a fine not exceeding five thousand dollars (\$5,000), or imprisonment in the county jail not exceeding one (1) year, or both. [I.C., § 20-219A, as added by 1982, ch. 104, § 1, p. 285.]

20-220. Investigation and examination to precede probation or suspension of sentence. — When a probation and parole officer is available to the court, no defendant shall be placed on probation until a written report of investigation by a parole and probation officer shall have been presented to and considered by the court, and no defendant charged with a felony or indictable offense shall be released under suspension of sentence without such investigation. The parole and probation officer shall inquire into the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. If a defendant is committed to any institution, the probation officer shall send a report of such investigation to the institution at the time of commitment. [1947, ch. 53, § 20, p. 59.]

Cited in: State v. Owen, 73 Idaho 394, 253 P.2d 203 (1953); State v. Gowin, 97 Idaho 146, 540 P.2d 808 (1975); State v. Wallace, 98 Idaho 318, 563 P.2d 42 (1977); State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983); Shouse v. Ljunggren, 792 F.2d 902 (9th Cir. 1986); State v. Atwood, 122 Idaho 199, 832 P.2d 1134 (Ct. App. 1992).

ANALYSIS

Absence of hearing request.
 Consideration by court.
 — Failure to consider report.
 Disclosure to defendant.
 Failure to conduct.
 Furtherance of punishment goals.
 Hearsay evidence.
 In general.
 Refusal of court to conduct.
 Time to consider application.

Absence of Hearing Request.

In the absence of an explicit request for a formal hearing, the court may reach its sentencing decision by receiving the unsworn formal statements presented by both sides, together with the presentence report and arguments of the respective counsel. State

v. Coutts, 101 Idaho 110, 609 P.2d 642 (1980).

Consideration by Court.

Where a presentence report did not recommend probation for defendant who pleaded guilty to charges of possession and delivery of a controlled substance, the failure of the case record to reflect whether trial court considered the report before sentencing defendant was not prejudicial error. State v. Arambula, 97 Idaho 627, 550 P.2d 130 (1976).

Even when a formal hearing pursuant to § 19-2516 (repealed 1995) is requested to consider aggravating or mitigating factors, it is proper for the court to receive and consider a presentence report; the hearing presents an opportunity to challenge or to rebut the report. State v. Cootz, 110 Idaho 807, 718 P.2d 1245 (Ct. App. 1986).

Only after the sentencing court has considered a pre-sentence report is the court positioned to make an informed decision regarding the viability of probation. State v. Romero, 116 Idaho 391, 775 P.2d 1233 (1989).

— Failure to Consider Report.

If a defendant is convicted of first degree murder and subject to the death penalty, probation, in all probability, is not a viable

alternative, however, the failure to consider a presentence report in such a circumstance would without question constitute reversible error. *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

Disclosure to Defendant.

The trial judge has discretion as to whether the full contents of the presentence report be disclosed to the defendant at the hearing on his application for probation, but, where he chooses not to disclose the report, he is obligated to give the defendant sufficient information concerning adverse matters contained therein so that the defendant may be in a position to offer intelligent refutation. Moreover, where the presentence report is used by the trial judge as the basis for determining the sentence imposed, or where it might otherwise influence the court in arriving at a sentence, full disclosure of the contents of the report must be made prior to any hearing on the sentence, after an application for probation is denied, in aggravation or mitigation of punishment in order to comply with the requirements of the statutes. *State v. Rolfe*, 92 Idaho 467, 444 P.2d 428 (1968).

A defendant is entitled to challenge the reliability of the hearsay information contained in a presentence report at his sentence hearing, and in order to exercise this right he is entitled to examine the report prior to the sentence hearing and to bring to the court's attention at the hearing matters contained in the report which he believes to be inaccurate. *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980).

Failure to Conduct.

Where the defendant who pled guilty to robbery admitted at his mitigation hearing that he had been out of prison only three and a half months before he had committed the robbery and had escaped twice from minimum security confinement, the trial court's rejection of probation as an alternative to incarceration and its imposition of sentence without a presentence investigation was not an abuse of discretion. *State v. Roderick*, 97 Idaho 82, 540 P.2d 267 (1975).

The failure to order a presentence report (PSR) when the defendant is being considered for probation is per se error, however, the converse is not true, and simply because probation is not an option in a particular case does not mean a sentencing judge may dispense with the presentence investigation, as a trial court may forego a PSR only where (a) the record affirmatively establishes a valid reason therefor, and (b) there is sufficient information from independent sources to enable the sentencing court to fashion an appro-

priate sentence. *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

Furtherance of Punishment Goals.

There are four goals of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) possibility of rehabilitation; and (4) punishment or retribution for wrongdoing, and without the crucial information provided in such sources as a presentence report, it is impossible for a sentencing court to make an informed decision necessary to promote these four goals. *State v. Romero*, 116 Idaho 391, 775 P.2d 1233 (1989).

Hearsay Evidence.

The legislature has specifically authorized admission of hearsay evidence for sentencing purposes in the form of a presentence investigation report, under this section; hearsay evidence in this form is admissible at a sentencing hearing so long as the defendant is afforded an opportunity to present favorable evidence and to explain or rebut adverse evidence. Thus, the trial court properly relied on hearsay evidence contained in the presentence investigation report, consisting of a letter written by the defendant outlining his involvement in criminal activities and containing on allegation by a neighbor that defendant had poured glue on their walks and rock salt on their lawn, since the defendant had an opportunity to respond to these allegations during the sentencing hearing. *State v. Mason*, 107 Idaho 706, 692 P.2d 350 (1984).

In General.

When a trial court receives information from an investigation report, the accused must have a reasonable opportunity to examine such report so that, should he desire, he may explain and defend adverse matters therein. *State v. Grady*, 89 Idaho 204, 404 P.2d 347 (1965).

Refusal of Court to Conduct.

Refusal of trial court to conduct a presentence investigation of defendant convicted of obtaining money under false pretenses was not erroneous where the defendant made no request for withholding or suspension of the sentence. *State v. McCallum*, 77 Idaho 489, 295 P.2d 259 (1956).

Time to Consider Application.

Once judgment of conviction is affirmed by court of appeal the trial court does not have jurisdiction to consider application by defendant for probation, but must enforce the judgment. *State v. Johnson*, 75 Idaho 157, 269 P.2d 769 (1954).

20-221. Modification of conditions of probation or suspension of sentence. — By order duly entered the court may impose and may at any time modify any conditions of probation or suspension of sentence. The court shall cause a copy of any such order to be delivered to the probation officer and parole officer and to the probationer. [1947, ch. 53, § 21, p. 59.]

Cited in: *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964); *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967); *State v. Garcia*, 124 Idaho 474, 860 P.2d 677 (Ct. App.

1993); *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994); *State v. Dorsey*, 126 Idaho 659, 889 P.2d 93 (Ct. App. 1995).

20-222. Indeterminate or fixed period of probation or suspension of sentence — Rearrest and revocation. — The period of probation or suspension of sentence may be indeterminate or may be fixed by the court, and may at any time be extended or terminated by the court. Such period with any extension thereof shall not exceed the maximum period for which the defendant might have been imprisoned.

At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Thereupon the court, after summary hearing may revoke the probation and suspension of sentence and cause the sentence imposed to be executed, or may cause the defendant to be brought before it and may continue or revoke the probation, or may impose any sentence which originally might have been imposed at the time of conviction. [1947, ch. 53, § 22, p. 59; am. 1986, ch. 311, § 1, p. 762.]

Compiler's notes. As enacted, the section heading of this section read "Indetermined or fixed period of probation or suspension of sentence — Rearrest and revocation."

Cross ref. Indeterminate sentences, § 19-2513.

Parole by court prior to sentence, § 19-2601 et seq.

Suspension of sentence and parole of youthful offenders, §§ 19-2601 — 19-2607.

Cited in: *State v. Mendenhall*, 106 Idaho 388, 679 P.2d 665 (Ct. App. 1984); *State v. Phillips*, 113 Idaho 176, 742 P.2d 431 (Ct. App. 1987); *State v. Roy*, 113 Idaho 388, 744 P.2d 116 (Ct. App. 1987); *State v. Lee*, 116 Idaho 38, 773 P.2d 655 (Ct. App. 1989); *State v. Maland*, 124 Idaho 830, 864 P.2d 668 (Ct. App. 1993); *State v. Williams*, 126 Idaho 39, 878 P.2d 213 (Ct. App. 1994); *State v. Farmer*, 131 Idaho 803, 964 P.2d 670 (Ct. App. 1998).

ANALYSIS

Admission by defendant.

Conditions of probation.

Construction.

Discretion of court.

Due process.

Lengthening of probation period.

Outstanding criminal charges.

Reinstatement of sentence.

— Reduction at time of reinstatement.

Retention of jurisdiction.

Revocation hearing.

— Waiver.

Revocation of probation.

— Applicability.

— Proper.

— Questions in proceeding.

— Sentence options.

— Untruthful written report.

Suspended sentence.

Violation of probation terms.

— Time when probationary period begins.

Admission by Defendant.

Defendant's admission of an alleged probation violation eliminated the issue of whether sufficient evidence had been presented to support a determination that the defendant was in fact in violation. *State v. Peterson*, 122 Idaho 178, 844 P.2d 31 (Ct. App. 1992).

Conditions of Probation.

Where the conditions of probation were not presented to the defendant in writing and explained to him by the sentencing court or at an early conference with the probation officer prior to the time the defendant was alleged to have violated the conditions of his probation,

the alleged violation of probation could not be the basis of reinstating his sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Defendant argued there was no affirmative indication that he knew of the probation condition that he not drive his car. However, a defendant's signature on a probation order indicates that he accepted, and certified that he fully understood, the conditions of probation. *State v. Reine*, 122 Idaho 928, 841 P.2d 458 (Ct. App. 1992).

Construction.

The portion of this statute which permits a court to "impose any sentence which originally might have been imposed at the time of conviction" refers only to a revocation of probation following a withheld judgment, while the portion which permits the original "sentence imposed to be executed" refers to a revocation of probation following a suspension of the execution of judgment and sentence. *State v. Pedraza*, 101 Idaho 440, 614 P.2d 980 (1980).

In a probation revocation proceeding, two questions are posed: (1) Did the probationer violate the terms of his probation? (2) If so, does the violation justify revoking the probation? *State v. Hall*, 114 Idaho 887, 761 P.2d 1239 (Ct. App. 1988).

Discretion of Court.

The revocation of probation is discretionary with the court; after sound determination that a probationer could not possibly perform fundamental conditions of his probation, the judge has discretion to remove probation and pronounce sentence. *State v. Bell*, 103 Idaho 255, 646 P.2d 1026 (Ct. App. 1982).

When a willful violation has occurred, the court has discretionary authority to revoke probation under this section. *State v. Fife*, 114 Idaho 103, 753 P.2d 839 (Ct. App. 1988).

The district court acted within its discretion when it decided that a defendant's conduct warranted the revocation of his probation. *State v. Drennen*, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992).

Due Process.

Neither the hearing, where the district court considered the prosecuting attorney's motion for a writ of mandate to the Department of Health and Welfare, nor the hearing on where judge reconsidered defendant's sentence, relinquished jurisdiction, and committed defendant to the Board of Corrections, satisfied the requirements of due process necessary for a probation violation hearing. *State v. Kelsey*, 115 Idaho 311, 766 P.2d 781 (1988).

Throughout probation revocation proceedings, the probationer is entitled to due process; before probation can be revoked, the court must conduct a hearing. *State v. Buzo*,

121 Idaho 324, 824 P.2d 899 (Ct. App. 1991).

A probationer must be given a due process hearing before probation can be revoked upon satisfactory proof of a violation of a probation condition or "any other cause satisfactory to the court." *State v. Greenawald*, 127 Idaho 555, 903 P.2d 144 (Ct. App. 1995).

Lengthening of Probation Period.

It was contemplated at the time of the original probation order which included a requirement that defendant pay a certain amount in restitution that a monthly payment schedule would be established thereafter and that the probation terms might be lengthened. The subsequent order specifying the minimum payment did not retract the requirement of full restitution but merely set out a minimum payment plan in accordance with the court's intent at the time of the initial probation order. Hence, the defendant was incorrect in asserting that complete restitution was not required and that he had satisfied all the conditions of his probation when the court extended the probation term for another seven years. *State v. Breeden*, 129 Idaho 813, 932 P.2d 936 (Ct. App. 1997).

Outstanding Criminal Charges.

Where there are outstanding criminal charges against a probationer which are not formally alleged as violations of probation, it is not error for information concerning those charges to be brought to the court's attention in probation violation proceedings, so long as the court does not rely upon the pending charges to find that a probation violation has occurred. Such information may be considered by the court as a factor in deciding whether to revoke or continue probation. *State v. Bell*, 103 Idaho 255, 646 P.2d 1026 (Ct. App. 1982).

Reinstatement of Sentence.

When a trial court has initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentence and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment. *State v. Pedraza*, 101 Idaho 440, 614 P.2d 980 (1980).

The defendant's admitted commission of a felony-possession of a dangerous weapon by an inmate—was a "cause satisfactory to the court" for revoking the suspended sentence and reinstating the sentence. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Where no motion to reduce the sentence was made under I.C.R. 35, nor was any suggestion made to the judge that under § 19-2603 he could choose not to reinstate the full ten-year sentence, the district court did not abuse its discretion in reinstating the remain-

der of the defendant's ten-year indeterminate sentence, where the defendant was found to be in possession of a dangerous weapon while in jail. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

In determining whether a court has abused its discretion in revoking probation and imposing a previously suspended sentence the inquiry is whether the court acted within the boundaries of such discretion, consistent with any legal standards applicable to its specific choices, and whether the court reached its decision by an exercise of reason. The court in making its decision examines whether the probation is achieving the goal of rehabilitation and is consistent with the protection of society. *State v. Hass*, 114 Idaho 554, 758 P.2d 713 (Ct. App. 1988).

In revoking the probation of a defendant and imposing a previously suspended sentence, the court is only required to act within the bounds of its discretion under this section and to reach its decision by an exercise of reason; it is not required to make a specific finding that defendant could not possibly perform the fundamental conditions of his probation. *State v. Hass*, 114 Idaho 554, 758 P.2d 713 (Ct. App. 1988).

The Court of Appeals found that the district court had acted within its discretion in revoking defendant's three-year probation and reinstating the previously suspended sentence of five years fixed; reinstating the full sentence, minus credit for time served, was not an abuse of the court's sentencing discretion. *State v. Martin*, 122 Idaho 423, 835 P.2d 658 (Ct. App. 1992).

Reinstatement of defendant's two-year sentence for grand theft was not unreasonable where defendant had a long prior record, and had previously absconded from parole in Oregon. *State v. New*, 123 Idaho 168, 845 P.2d 586 (Ct. App. 1993).

—Reduction at Time of Reinstatement.

The Court of Appeals has construed I.C.R. 35 to authorize district judges to reduce a sentence which is being reinstated when the reduction is made at the time probation is revoked; therefore, the district court had authority to reduce defendant's sentence at the time it revoked his probation; because the district judge reduced defendant's original sentence "upon" revoking his probation, the state's argument that the court lacked jurisdiction was unfounded. *State v. Peterson*, 121 Idaho 775, 828 P.2d 338 (Ct. App. 1992).

Retention of Jurisdiction.

The trial court did not have authority to retain jurisdiction a second time, more than 120 days after a sentence to the custody of the board of corrections, following revocation of defendant's probation. *State v. Travis*, 125 Idaho 1, 867 P.2d 234 (1994).

Revocation Hearing.

A probation revocation hearing must be based upon charges sufficiently specific that the probationer be informed of the allegedly violated term or condition of the probation order and the manner and circumstances of his violation so that he can intelligently prepare his defense; he must be allowed to call witnesses under oath, to testify himself and otherwise produce relevant evidence in his own behalf, and he must be given a reasonable opportunity to examine and rebut adverse evidence and to cross-examine adverse witnesses. *State v. Edelblute*, 91 Idaho 469, 424 P.2d 739 (1967).

—Waiver.

Although the defendant did not receive written notice of the alleged violation of probation or cause satisfactory to the court for revoking the suspended sentence before the hearing at which the violation was admitted, he waived his right to notice when he elected to proceed without an evidentiary hearing or a formal affidavit from the Department of Probation and Parole. *State v. Hancock*, 111 Idaho 835, 727 P.2d 1263 (Ct. App. 1986).

Revocation of Probation.

Where probationer admitted his violations, eliminating the issue of whether sufficient evidence was presented to support a determination that he was in fact in violation, and had repeatedly demonstrated his unwillingness or inability to adhere to very fundamental conditions of probation, the district court did not abuse its discretion in revoking probation and ordering execution of the sentence. *State v. Bell*, 103 Idaho 255, 646 P.2d 1026 (Ct. App. 1982).

The district court may, in its discretion, revoke probation at any time during the probationary period if the defendant has violated any of the terms of the probation. *State v. Case*, 112 Idaho 1136, 739 P.2d 435 (Ct. App. 1987); *State v. Hall*, 114 Idaho 887, 761 P.2d 1239 (Ct. App. 1988).

Possession of a firearm was sufficient, by itself, to prove a violation of probation, where the defendant's Agreement of Supervision prohibited possession of any firearm or other weapon as set forth by the United States and state statutes, and the district court found that the defendant was informed he could not possess firearms and that he understood the condition. *State v. Fife*, 114 Idaho 103, 753 P.2d 839 (Ct. App. 1988).

In a probation revocation proceeding, the court must decide whether the probationer violated the terms of probation and, if so, whether the probation should be revoked. *State v. Marks*, 116 Idaho 976, 783 P.2d 315 (Ct. App. 1989).

Where defendant had failed to make restitution as scheduled and had been charged,

since being on probation, with petty theft and operating a motor vehicle without insurance, revocation of probation was not an abuse of discretion by the district court. *State v. McDonough*, 120 Idaho 650, 818 P.2d 354 (Ct. App. 1991).

Where prior reinstatements of probation did little to dissuade defendant from abusing alcohol which in turn led to new violations of the law, the revocation of probation by the district court was not an abuse of discretion. *State v. Garcia*, 124 Idaho 474, 860 P.2d 677 (Ct. App. 1993).

Until a probation was revoked and a sentence of incarceration was executed, the trial court never lost, and the Idaho Department of Corrections never acquired, jurisdiction over a probationer; the trial court's revisiting of the disposition order was permissible because the reconsideration occurred in what was, in substance, a continuation of the initial disposition hearing. *State v. Done*, — Idaho —, 84 P.3d 571 (Ct. App. 2003).

—Applicability.

The provisions of § 19-2520 do not govern the court's decision to revoke probation once a probation violation has been proven; the statute applicable to the court's discretionary decision after a defendant has violated probation is this section. *State v. Drennen*, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992).

—Proper.

Where in revoking defendant's probation and imposing a previously suspended sentence the court noted that this was the third violation of probation by defendant and that he had continued to engage in counter productive acts, including consorting with individuals who made adherence to his probation requirements difficult, there was no abuse of discretion. *State v. Hass*, 114 Idaho 554, 758 P.2d 713 (Ct. App. 1988).

Where the conditions of probation included the requirements that the defendant pay restitution in the amount of \$300 per month, that he actively seek out and retain the employment necessary to make his restitution payments, and that he maintain close contact with his probation officer, and the district court specifically found that the defendant had not actively sought or maintained employment and had not paid restitution, the district court did not abuse its discretion in revoking the defendant's probation. *State v. Hall*, 114 Idaho 887, 761 P.2d 1239 (Ct. App. 1988).

District court did not abuse its discretion in revoking defendant's probation and ordering execution of his sentence where defendant violated the terms of his probation twice within a one-year period, where the district court noted that defendant had not responded to probation counseling and was not likely to

do so in the future, and where the district court took into consideration defendant's mental impairments in reaching its decision and retained jurisdiction over defendant for 120 days to further evaluate his mental condition. *State v. Fife*, 115 Idaho 879, 771 P.2d 543 (Ct. App. 1989).

Where defendant demonstrated a reckless disdain for the authority of the court by repeatedly violating probation conditions, and where even after the trial court sternly warned her to refrain from any conduct not expressly permitted by her probation officer, defendant violated her curfew and engaged in conduct demonstrating a willingness to bring harm upon herself (taking a drug overdose) or upon others (driving under the influence), under the circumstances, the court did not abuse its discretion in holding that probation should be revoked. *State v. Marks*, 116 Idaho 976, 783 P.2d 315 (Ct. App. 1989).

Where defendant had a history of previous convictions for lewd conduct with minors and had violated probation on other occasions, although counseling would not be available in custody, the district judge's ruling was consistent with the often cited primary sentencing goal of protection of society; the district judge had sufficient information to decide that probation was not working and that continued probationary status would endanger the public, particularly young boys. *State v. Beckett*, 122 Idaho 324, 834 P.2d 326 (Ct. App. 1992).

The District Court noted in its comments at the probation revocation hearing that defendant had been given a number of prior opportunities to rehabilitate and to overcome his substance abuse problem. The court concluded, however, that defendant's lack of success with probation, coupled with his propensity for violence evidenced by his conviction for aggravated assault and his prior conviction of misdemeanor battery, required the revocation of probation. *State v. Boss*, 122 Idaho 747, 838 P.2d 876 (Ct. App. 1992).

The court concluded that the positive things defendant had done during probation were outweighed by the negative. Defendant was very untruthful in his response to the alleged probation violations, and when defendant committed the burglary in Idaho he was on probation for attempted petit theft in California. *State v. Reine*, 122 Idaho 928, 841 P.2d 458 (Ct. App. 1992).

Where defendant left the jurisdiction without any contact with probation officials and offered no plausible excuse for this conduct and where the District Court implicitly determined that defendant's disregard of the reporting obligation was willful, and considering that he was also wanted on outstanding warrants in other counties for failure to report, the district judge acted within his discretion in revoking defendant's probation not-

withstanding that, at the time of the acts charged as violations, he had successfully completed half of his required probationary period. *State v. Peterson*, 122 Idaho 178, 844 P.2d 31 (Ct. App. 1992).

The district court did not abuse its discretion in revoking defendant's probation where defendant had understood the conditions of his probation but chose to ignore them whenever compliance became inconvenient and repeatedly absconded from probation. *State v. New*, 123 Idaho 168, 845 P.2d 586 (Ct. App. 1993).

The district court properly took into consideration that defendant had violated his probation twice before the instant violation, which on each occasion was on account of drinking and driving leading to driving under the influence charges; therefore, the order revoking probation and committing defendant to serve his sentence was affirmed. *State v. Thomas*, 123 Idaho 183, 845 P.2d 1216 (Ct. App. 1993).

The court did not abuse its discretion when it revoked defendant's probation where defendant's failure to report to his probation officer made it impossible for the officer to monitor defendant's living and working circumstances, his conduct, or the type of people with whom he was associating, and without the ability to monitor a probationer's activities, the state is unable to assure that probationary release is consistent with the protection of society. *State v. Chavez*, 134 Idaho 308, 1 P.3d 809 (Ct. App. 2000).

—Questions in Proceeding.

In a probation revocation proceeding two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? Then, if the court determines that probation should be revoked, a third question arises—what prison sentence should be ordered? *State v. Corder*, 115 Idaho 1137, 772 P.2d 1231 (Ct. App. 1989).

—Sentence Options.

When a court determines that probation should be revoked, if a prison sentence previously has been pronounced but suspended, that sentence may be ordered into execution, or, alternatively the court is authorized under I.C.R. 35 to reduce the sentence upon revocation of the probation. *State v. Corder*, 115 Idaho 1137, 772 P.2d 1231 (Ct. App. 1989).

After a probation violation has been proven, the decision to revoke probation and to pronounce sentence lies with the sound discretion of the trial court. Upon revoking probation, the court may order the suspended sentence executed, or, in the alternative, the court is authorized under I.C.R. 35 to reduce the sentence. *State v. Schorzman*, 122 Idaho 201, 832 P.2d 1136 (Ct. App. 1992).

—Untruthful Written Report.

The condition that a probationer file a truthful written report, which included a question as to whether the probationer had contact with law enforcement, was valid as being reasonably related to the rehabilitation; therefore, there was no abuse of discretion in the court's decision to revoke defendant's probation for his failure to provide a truthful report. *State v. Jones*, 123 Idaho 315, 847 P.2d 1176 (Ct. App. 1993).

Suspended Sentence.

Where a probationer violated the terms of probation and where the court determined that the probation should be revoked, if the probationer is subject to a suspended sentence, the court may order the suspended sentence to be executed, or, alternatively, the court is authorized under I.C.R. 35 to reduce the sentence upon revocation. *State v. Marks*, 116 Idaho 976, 783 P.2d 315 (Ct. App. 1989).

The difference between suspending the imposition of sentence and withholding judgment is that under the former the defendant's judgment of conviction is entered, whereas in the latter case it is withheld. *Peltier v. State*, 119 Idaho 454, 808 P.2d 373 (1991).

Violation of Probation Terms.

Where defendant, while on probation, drove while intoxicated, drove without privileges, obstructed an officer, repeatedly violated her curfew requirement, left the county without permission, and entered into a prohibited financial agreement in violation of the terms of her intense supervision, the district court's finding that defendant was in violation of the terms of her probation was fully supported by the record. *State v. Marks*, 116 Idaho 976, 783 P.2d 315 (Ct. App. 1989).

Probation officer instructed defendant not to drive or let anyone else drive defendant's car until defendant purchased insurance for it. The state proved that defendant let his girlfriend drive it. The court revoked probation and ordered defendant's sentence be executed. *State v. Reine*, 122 Idaho 928, 841 P.2d 458 (Ct. App. 1992).

—Time When Probationary Period Begins.

Defendant allegedly violated the terms and conditions of probation before the court had a chance to file a written order; however, because defendant had full knowledge of the terms and conditions of his probation after the court had explained them in open court, defendant's probationary period began at the time the court announced the terms of probation in open court. *State v. Russell*, 122 Idaho 515, 835 P.2d 1326 (Ct. App. 1991), vacated on other grounds, 122 Idaho 488, 835 P.2d 1299 (1992).

The length of a term of probation is the time

period established by order of the court pursuant to this section, and the probationary period does not end merely because the financial obligations, such as restitution, fines and

court costs, which were made conditions of the probation, have been met. *State v. Gallepeau*, 128 Idaho 1, 909 P.2d 619 (Ct. App. 1994).

20-223. Parole and rules governing — Restrictions — Psychiatric or psychological examination. — (a) Subject to section 19-2513, Idaho Code, the commission shall have the power to establish rules, policies or procedures in compliance with chapter 52, title 67, Idaho Code, under which any prisoner, excepting any under sentence of death, may be allowed to go upon parole but to remain while on parole in the legal custody and under the control of the board and subject to be taken back into confinement at the direction of the commission. Any prisoner who is granted parole under the interstate compact may be required to post a bond prior to release or prior to such acceptance under the interstate compact; such bond may be posted by the prisoner, the prisoner's family, or other interested party. Failure to successfully complete parole may be grounds for forfeiture of the bond. Upon successful completion of parole, the amount of the bond will be returned, less an amount for administrative costs as determined by commission rule, in compliance with chapter 52, title 67, Idaho Code. Funds collected through the bonding process will be placed in a separate commission receipts fund which is hereby created in the state treasury, and utilized for the extradition of said parole violators.

(b) No person serving a sentence for rape, incest, committing a lewd act upon a child, crime against nature, or with an intent or an assault with intent to commit any of the said crimes or whose history and conduct indicate to the commission that he is a sexually dangerous person, shall be released on parole except upon the examination and evaluation of one (1) or more psychiatrists or psychologists to be selected by the commission and such evaluation shall be duly considered by the commission in making its parole determination. The commission may, in its discretion, likewise require a similar examination and evaluation for persons serving sentences for crimes other than those above enumerated. No psychiatrist or psychologist making such evaluation shall be held financially responsible to any person for denial of parole by the commission or for the results of the future acts of such person if he be granted parole.

(c) Before considering the parole of any prisoner, the commission shall afford the prisoner the opportunity to be interviewed by the commission, a commissioner or other designated commission staff. A designated report prepared by commission staff or a designated department of correction employee which is specifically to be used by the commission in making a parole determination shall be exempt from public disclosure; such reports contain information from the presentence investigation report, medical or psychological information, victim information, designated confidential witness information and criminal history information. A parole shall be ordered when, in the discretion of the commission, it is in the best interests of society, and the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen. Such determination shall not be a reward of clemency and it shall not be considered to be a reduction of

sentence or a pardon. The commission may also by its rules, policies or procedures fix the times and conditions under which any application denied may be reconsidered. No action may be maintained against the commission and/or any of its members in any court in connection with any decision taken by the commission to parole a prisoner and neither the commission nor its members shall be liable in any way for its action with respect thereto.

(d) In making any parole or commutation decision with respect to a prisoner, the commission shall consider the compliance of the prisoner with any order of restitution which may have been entered according to section 19-5304, Idaho Code. The commission may make compliance with such an order of restitution a condition of parole.

(e) Except as provided in subsection (a) of this section, no provision of chapter 52, title 67, Idaho Code, shall apply to the commission.

(f) Subject to the limitations of this subsection and notwithstanding any fixed term of confinement or minimum period of confinement as provided in section 19-2513, Idaho Code, the commission may parole an inmate for medical reasons. A prisoner may be considered for medical parole only when the prisoner is permanently incapacitated or terminally ill and when the commission reasonably believes the prisoner no longer poses a threat to the safety of society. For the purposes of this section "permanently incapacitated" shall mean a person who, by reason of an existing physical condition which is not terminal, is permanently and irreversibly physically incapacitated. For the purposes of this section "terminally ill" shall mean a person who has an incurable condition caused by illness or disease and who is irreversibly terminally ill.

(g) The commission shall prepare and send to the house and senate judiciary committees annually a report containing the names, medical condition and current status of all persons granted parole pursuant to subsection (f) of this section. [I.C., § 20-223, as added by 1980, ch. 297, § 6, p. 768; am. 1985, ch. 122, § 6, p. 296; am. 1986, ch. 232, § 5, p. 638; am. 1989, ch. 369, § 1, p. 926; am. 1993, ch. 106, § 1, p. 271; am. 1998, ch. 327, § 1, p. 1055; am. 1999, ch. 326, § 1, p. 834; am. 2000, ch. 368, § 3, p. 1219.]

Compiler's notes. Former § 20-223 which comprised S.L. 1947, ch. 53, § 23, p. 59; am. 1950 (E. S.), ch. 75, § 1, p. 99; am. 1970, ch. 143, § 8, p. 425; am. 1971, ch. 93, § 1, p. 204, was repealed by S.L. 1980, ch. 297, § 5.

Section 2 of S.L. 1993, ch. 106 is compiled as § 19-2513.

Section 4 of S.L. 1980, ch. 297 is compiled as § 20-219.

Section 4 of S.L. 1985, ch. 122 is compiled as § 19-5302, § 5 was repealed, and § 7 is compiled as § 19-5303.

Section 3 of S.L. 1986, ch. 232 is compiled as § 19-2513 and § 4 repealed § 19-2513A.

Section 2 of S.L. 1998, ch. 327 is compiled as § 20-228.

Section 2 of S.L. 2000, ch. 368 is compiled as § 9-342.

Section 2 of S.L. 1989, ch. 369 declared an emergency. Approved April 5, 1989.

Section 9 of S.L. 1985, ch. 122 read: "This

act shall be in full force and effect on October 1, 1985, and shall apply to persons against whom a criminal complaint or juvenile petition is filed on or after October 1, 1985."

Section 6 of S.L. 1986, ch. 232 read: "This act shall be in full force and effect on and after February 1, 1987, and the amendments in this act shall apply only to those persons who shall commit an offense on or after February 1, 1987, and are not intended to repeal or amend those provisions of the Code which apply to persons committing an offense prior to February 1, 1987, which provisions shall continue to apply, and further that amendments in this act are not intended to repeal or amend sections 19-2520, 19-2520A, 19-2520B, 19-2520C or 19-2520D, Idaho Code."

Title of 1986 Act. Section 1 of S.L. 1986, ch. 232 read: "This act shall be known as the 'Unified Sentencing Act of 1986.'"

Cross ref. County commissioners may em-

ploy inmates upon public road work or other county work, § 31-824.

Sec. to sec. ref. This section is referred to in §§ 9-340B, 18-8321, 19-2513, 19-2515, and 19-4213.

Cited in: *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979); *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979); *State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982); *State v. Moore*, 104 Idaho 226, 657 P.2d 1094 (Ct. App. 1983); *Holmes v. State*, 104 Idaho 312, 658 P.2d 983 (Ct. App. 1983); *State v. Lloyd*, 104 Idaho 397, 659 P.2d 151 (Ct. App. 1983); *State v. Wilde*, 104 Idaho 461, 660 P.2d 73 (Ct. App. 1983); *State v. Rossi*, 105 Idaho 681, 672 P.2d 249 (Ct. App. 1983); *State v. Gilman*, 105 Idaho 898, 673 P.2d 1085 (Ct. App. 1983); *State v. Camarillo*, 106 Idaho 310, 678 P.2d 102 (Ct. App. 1984); *State v. Lopez*, 106 Idaho 447, 680 P.2d 869 (Ct. App. 1984); *State v. Tisdale*, 107 Idaho 481, 690 P.2d 936 (Ct. App. 1984); *Roberts v. State*, 108 Idaho 183, 697 P.2d 1197 (Ct. App. 1985); *State v. Harrison*, 108 Idaho 324, 699 P.2d 30 (Ct. App. 1985); *State v. Martinez*, 109 Idaho 61, 704 P.2d 965 (Ct. App. 1985); *State v. Plumley*, 109 Idaho 369, 707 P.2d 480 (Ct. App. 1985); *State v. Desjarlais*, 110 Idaho 100, 714 P.2d 69 (Ct. App. 1986); *State v. Lee*, 111 Idaho 489, 725 P.2d 194 (Ct. App. 1986); *State v. Hemenway*, 111 Idaho 839, 727 P.2d 1267 (Ct. App. 1986); *State v. Reinke*, 111 Idaho 968, 729 P.2d 443 (Ct. App. 1986); *State v. Roach*, 112 Idaho 173, 730 P.2d 1093 (Ct. App. 1986); *State v. Simons*, 112 Idaho 254, 731 P.2d 797 (Ct. App. 1987); *State v. Banks*, 113 Idaho 54, 740 P.2d 1039 (Ct. App. 1987); *State v. Carrasco*, 114 Idaho 348, 757 P.2d 211 (Ct. App. 1988); *State v. Talley*, 114 Idaho 898, 761 P.2d 1250 (Ct. App. 1988); *State v. Bartlett*, 118 Idaho 722, 800 P.2d 118 (Ct. App. 1990); *Whitehawk v. State*, 119 Idaho 168, 804 P.2d 341 (Ct. App. 1991); *State v. Aubert*, 119 Idaho 868, 811 P.2d 44 (Ct. App. 1991); *State v. Snow*, 120 Idaho 277, 815 P.2d 475 (Ct. App. 1991); *Rodriguez v. State*, 122 Idaho 20, 830 P.2d 531 (Ct. App. 1992), modified on other grounds, *Follinus v. State*, 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995); *Brandt v. State*, 126 Idaho 101, 878 P.2d 800 (Ct. App. 1994); *Storm v. Spaulding*, 137 Idaho 145, 44 P.3d 1200 (Ct. App. 2002).

ANALYSIS

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Appellate Review.

In the absence of exceptional circumstances, an inmate serving a single, indeterminate sentence for a crime not enumerated in this section, will be considered for parole at some time within the first one-third of the sentence. Accordingly, for the purpose of appellate review of an indeterminate sentence, the Court of Appeals will deem one-third of the sentence to be appropriate measure of the term of confinement, unless the record indicates the contrary. *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982).

In reviewing the length of confinement under indeterminate sentences, the Court of Appeals will take account of parole eligibility and presume that the defendant's actual term of confinement will be at least one-third of his sentence. *State v. Spurgeon*, 107 Idaho 173, 687 P.2d 17 (Ct. App. 1984).

For the purpose of appellate review, one-third of 25-year indeterminate sentences is treated as the measure of confinement. *State v. Glandon*, 109 Idaho 755, 710 P.2d 665 (Ct. App. 1985).

Where, in denying parole, the Pardons and Parole Commission orally stated reasons to the defendant at the hearing based on his drug-related crimes and the Commission's desire to have him serve more time, this satisfied the rational basis requirement of appellate review. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Appellate review is limited to whether there is a rational basis in the record for the Pardons and Parole Commission's decision. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Given the close alignment of the Commission of Pardons and Paroles with the Board of Corrections, the fact that the Commission is exercising the parole power delegated to it by the Board, and the fact that the legislature found it necessary to specifically give author-

ity to the Commission to promulgate regulations pursuant to the Administrative Procedures Act in subsection (a) of this section, the Commission's parole and probation functions are, as were those of the Board of Corrections before it, exempt from the appeal provision of § 67-5215(a) (now repealed). *Carman v. State*, Comm'n of Pardons & Parole, 119 Idaho 642, 809 P.2d 503 (1991).

Where sex offender claimed that due to the requirements of this section, his probable term of confinement, for the purpose of an I.C.R. 35 motion, should be determined by his indeterminate life sentence rather than by the fixed portion of the sentence, the court declined to address the issue because it was raised for the first time on appeal. *State v. Alberts*, 124 Idaho 489, 861 P.2d 59 (1993).

Bill of Attainder.

As a matter of law this section does not constitute a bill of attainder in respect to the legislature's constitutional power to determine when, or under what circumstances, a prisoner may be eligible for parole consideration. *Volker v. State*, 107 Idaho 1059, 695 P.2d 809 (Ct. App. 1985).

Discretion of Commission.

—Limitations.

This section does not place any substantive limitations upon the Pardons and Parole Commission's discretion in the consideration of its decision. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Due Process.

Parole under this section is only a mere possibility, and the possibility of parole is not protected by due process; the constitutional protection afforded this limited expectation of parole is found in the procedures enacted to grant parole. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

Summary judgment was improperly granted in favor of the prison warden in the inmate's habeas corpus petition where the inmate's allegation that he was informed of the Idaho Commission of Pardons and Paroles' parole decision in a summary fashion while being ushered from the room after the conclusion of his Sentence 1 parole revocation hearing was sufficient to raise factual issues as to whether the commission deprived the inmate of the right to notice and an opportunity to participate in a parole hearing on Sentence 2; these factual issues precluded summary judgment on the inmate's claim for relief with respect to his Sentence 2 parole proceeding. *Acheson v. Klauser*, — Idaho —, 75 P.3d 210 (Ct. App. 2003).

Enhancement Sentence.

A defendant sentenced to an indeterminate life sentence plus an additional term for use of

a firearm, said sentences to be served consecutively, must serve the indeterminate life sentence until paroled or pardoned, at which time he or she must immediately begin serving the firearm sentence until paroled, pardoned, or discharged. *State v. Kaiser*, 108 Idaho 17, 696 P.2d 868 (1985).

The requirements of this section do not constitute an enhancement of sentence; moreover, this section applies to a defendant not because of his mental or physical status but because he committed one of the enumerated offenses. It, thus, does not inflict a cruel or unusual punishment. *State v. Gee*, 107 Idaho 991, 695 P.2d 376 (1985).

Under this section, as in effect at the time defendant committed his crimes, a ten-year indeterminate sentence for robbery would require defendant serve an additional forty months following the completion of two concurrent twenty-five year determinate sentences. *State v. Amerson*, 129 Idaho 395, 925 P.2d 399 (Ct. App. 1996), cert. denied, 521 U.S. 1123, 117 S. Ct. 2519, 138 L. Ed. 2d 1020 (1997).

Guilty Pleas.

Informing a defendant of parole consequences may be desirable but is not a constitutional prerequisite to accepting a guilty plea. *Brooks v. State*, 108 Idaho 855, 702 P.2d 893 (Ct. App. 1985).

The counsel's alleged error in stating the potential effect of a ten-year sentence, particularly the minimum time provisions for parole eligibility under this section, did not affect the voluntariness of the defendant's guilty plea. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), aff'd, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Ineffective Assistance of Counsel.

The Court of Appeals correctly applied the precedent that the failure of counsel to inform an accused of the effect of this section on the minimum period of confinement before eligibility for parole did not constitute ineffective assistance of counsel that would affect the voluntariness of the plea. *Hays v. State*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

In General.

Time served on parole is not the same as time served in a correctional institution. Parole is a gratuity which shall be ordered only for the best interests of society, not as a reward of clemency. *Flores v. State*, 109 Idaho 182, 706 P.2d 71 (Ct. App. 1985).

Life Sentence.

As punishment for first degree murder, the accused may be sentenced to death or to a life

term in the custody of the Board of Correction. Where capital punishment was not pursued by the state, the decision by the sentencing court as to whether the life sentence could be indeterminate with the possibility of parole after ten years, § 20-233, or would be served entirely in confinement as a fixed or determinate sentence without the possibility of parole, was a matter within the court's discretion. *State v. Tribe*, 126 Idaho 610, 888 P.2d 389 (Ct. App. 1994).

Maximum Sentence.

Other than where legislative restrictions as to parole or other release of a committed offender have been placed on the board or commission involving certain specified crimes, the sentencing judge, using an indeterminate sentence with its maximum to be set by the judge, is basically viewing such maximum as being the longest period reasonably expected to be required to accomplish rehabilitation. *State v. Kingsley*, 99 Idaho 868, 590 P.2d 1014 (1979).

Measure of Confinement.

Absent a contrary statute or other indication in the record, appellate court will treat one-third of an indeterminate sentence as the measure of confinement. *State v. Jenkins*, 105 Idaho 166, 667 P.2d 269 (Ct. App. 1983).

For the purpose of appellate review, the court will apply the one-third measure of confinement, rather than a lesser statutory minimum, to an indeterminate sentence in a case under this section. *State v. Jenkins*, 105 Idaho 166, 667 P.2d 269 (Ct. App. 1983).

Absent a contrary statute or other indication in the record, appellate court, in reviewing sentence, will treat one-third of an indeterminate sentence as the measure of confinement. *State v. Adams*, 106 Idaho 309, 678 P.2d 101 (Ct. App. 1984).

For the purpose of appellate review of the excessiveness of a sentence, but not as a prediction of parole, the appellate court presumes, absent a contrary statute or indication in the record, that the actual duration of confinement under an indeterminate sentence will be one-third of the sentence length. This section, which governs parole consideration in serious cases, including rape, is not deemed to be a "contrary" statute for this purpose; the one-third measure will be applied even if a prisoner might be eligible for parole consideration earlier under the statute. *State v. Mahoney*, 107 Idaho 190, 687 P.2d 580 (Ct. App. 1984).

Murder.

One convicted of first degree murder may be sentenced to an indeterminate life sentence and if the sentence is for indeterminate life, this section setting forth powers of the state board of correction, prohibits release on

parole until ten years have been served; nevertheless, a sentence for a fixed term of ten years is in no sense of the phrase a life sentence. *State v. Wilson*, 107 Idaho 506, 690 P.2d 1338 (1984).

Parole.

—Conditions.

Although only the Commission for Pardons and Parole may impose substantive, rehabilitative conditions of parole, the Board of Correction may recommend substantive conditions, and the Commission may delegate to its executive director the authority to act in its behalf in approving the Board's recommended parole conditions. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Parole conditions are not additional punishments or penalties to the crime for which a person was sentenced and incarcerated; their violation may simply result in the loss of parole, consequently, implementation of the Intensive Supervision Program did not violate the ex post facto prohibition. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

The intensive supervision program conditions of parole authorizing warrantless searches, requiring the payment of fees to defray costs of supervision, restricting the use of alcohol, and establishing a curfew and geographic restrictions were reasonable, were possible to perform, and had an acceptable aim toward rehabilitation. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

—Eligibility.

When the minimum period specified by the judge has been served, the individual becomes parole-eligible; he may be released on parole at any time thereafter, during the indeterminate portion of the sentence. *State v. Knight*, 114 Idaho 923, 762 P.2d 836 (Ct. App. 1988).

The determination of whether an inmate has served a commensurate amount of his sentence such that he is eligible for parole rests with the Department of Corrections, not the sentencing judge. *State v. Sherman*, 120 Idaho 464, 816 P.2d 1021 (Ct. App. 1991).

Determination of whether or not an inmate has served a commensurate amount of his sentence such that he is eligible for parole rests with the Department of Corrections pursuant to this section, and not with the sentencing judge; district court below correctly decided that defendant was not entitled to post-conviction relief in an effort to challenge the authority of the parole commission to decide that a prisoner should not be released on parole until a point in time after the expiration of the minimum period of confinement ordered by the sentencing judge and

specified under § 19-2513. *State v. Nickerson*, 126 Idaho 818, 892 P.2d 493 (Ct. App. 1995).

Change in parole reconsideration rules did not constitute an *ex post facto* violation because the eligibility standards for parole were the same for a prisoner as they were when he was originally incarcerated; all that had changed was the procedure by which the prisoner was reviewed for parole eligibility. *Quinlan v. Idaho Comm'n for Pardons & Parole*, 138 Idaho 726, 69 P.3d 146 (2003).

—Protected Interest.

A protected interest in parole does not come into existence after successful completion of one-third of the defendant's indeterminate sentence. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

—Revocation.

The Commission for Pardons and Parole's act of revoking the defendant's parole for violating conditions recommended by the Board of Correction and approved by the Commission's executive director could be inferred as a ratification of the director's approval. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

—Right to.

This State's parole scheme does not establish a protected interest or right to be released; the "shall" language used in this section does not set forth detailed conditions and qualifications which, once being met, entitle a prisoner to expect parole, but rather merely sets forth conditions which must be satisfied before an applicant becomes eligible for parole. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

There is no constitutionally protected interest in parole. *Hays v. State*, 132 Idaho 516, 975 P.2d 1181 (Ct. App. 1999).

—Statement of Reasons for Denial.

A defendant is not entitled to a written statement of reasons for denial of his parole. *Vittone v. State*, 114 Idaho 618, 759 P.2d 909 (Ct. App. 1988).

—Timing for Review.

A regulatory change by the Parole Commission in the timing for review of an inmate's eligibility for parole does not give rise to a claim that the alteration violates the constitutional restriction against *ex post facto* laws. *Freeman v. State, Comm'n of Pardons & Paroles*, 119 Idaho 692, 809 P.2d 1171 (Ct. App. 1991).

Psychiatric Evaluation.

As a matter of law this section does not constitute a bill of attainder; since the "type and severity" of the burden of undergoing a psychiatric evaluation is nonpunitive and slight, it bears a reasonable relationship to

the proper state purpose of ensuring that prisoners released on parole will be likely to successfully serve the remainder of their sentences out of the physical custody of the board of corrections. *State v. Gee*, 107 Idaho 991, 695 P.2d 376 (1985).

Where in amended petition for a writ of habeas corpus, petitioner questioned the sufficiency of the amount of time—90 minutes—for his answers to written questions and responses during an interview by a psychological evaluator prepared pursuant to this section, but where on appeal he presented no cogent argument or citation to any authority demonstrating that any error occurred with regard to the preparation or consideration of the report which would entitle him to habeas corpus relief such issue was unreviewable. *Freeman v. State, Comm'n of Pardons & Paroles*, 119 Idaho 692, 809 P.2d 1171 (Ct. App. 1991).

Magistrate and district court erred in dismissing the inmate's petition as it was unclear from the record as to whether the individual who performed the inmate's psychological evaluation was a licensed professional. *Dopp v. Idaho Comm'n of Pardons & Parole*, — Idaho —, 84 P.3d 593 (Ct. App. 2004).

Psychiatric Treatment.

A failure by the Board of Correction to provide psychological treatment for convicted pedophiles or other sexual offenders would not render either the conviction or the sentence, as pronounced, unlawful. If treatment is legally required, as the United States District Court for this state has held, and if the treatment is nonexistent or is inadequate, then the proper remedy is to mandate reasonably adequate treatment. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Lack of psychological treatment available to the individual convicted of lewd and lascivious conduct created an issue cognizable in post-conviction relief proceedings. *Hays v. State*, 113 Idaho 736, 747 P.2d 758 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), overruled on other grounds, *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992).

Since the purpose in sentencing is punitive and not rehabilitative, this section does not require the establishment of a special psychological treatment program for sex offenders. *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

Rules and Regulations.

This section in giving the commission of pardons and parole the power to promulgate rules and regulations in compliance with the Administrative Procedures Act (§ 67-5201 et

seq.) did not mandate that the procedural rights established in that Act be utilized in parole hearings; moreover, the definitional statement of the Act in § 67-5201(1) specifically excludes the board of corrections from the requirements of the Act. *Balla v. Idaho State Bd. of Cors.*, 595 F. Supp. 1558 (D. Idaho 1984) *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

Sentence Reduced.

Indeterminate sentence of 30 years for rape would be reduced to 25 years where crime was defendant's first felony and the lesser sentence would serve the court's stated objectives of protection of society and punishment of defendant. *State v. Martinez*, 105 Idaho 841, 673 P.2d 441 (Ct. App. 1983).

Sentence Valid.

Indeterminate sentence of 20 years upon conviction of second-degree murder, based on defendant's shooting of wife, was within statutory maximum and was not excessive where defendant would be eligible for parole within five years, where sentence indicated that trial judge took account of mitigating factors, where society had an interest in retribution for and deterrence of similar crimes, and where rehabilitative programs would be available to aid defendant with regard to alcohol abuse and alleged post-traumatic stress disorder. *State v. Pettit*, 104 Idaho 601, 661 P.2d 767 (Ct. App. 1983).

In prosecution for attempted rape of a child, where the investigation disclosed that defendant, who was 22 years old when sentenced, had prior convictions for a burglary and two petit larcenies and also had a history of unlawful use and distribution of drugs and alcohol, the imposition of a ten-year indeterminate sentence did not represent an abuse of discretion and the district judge did not abuse his discretion by refusing to retain jurisdiction under § 19-2601 4. *State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983), *aff'd*, 106 Idaho 665, 682 P.2d 618 (1984).

Sentence of indeterminate period not exceeding 25 years, imposed after conviction of second-degree murder, was not excessive where the record disclosed a senseless killing by a defendant with a long history of alcohol and firearm-related offenses; defendant would face confinement for a period of at least eight years and four months, under this section, which was warranted in order to protect society from defendant and as retribution for the senseless taking of human life. *State v. Jenkins*, 105 Idaho 166, 667 P.2d 269 (Ct. App. 1983).

Sex Offenders.

Through this section, having chosen to incarcerate a class of inmates on the basis of being sex offenders, and other categories of

mental illness, the state has thus determined that it no longer has an interest in punishing the inmate, but rather in attempting to rehabilitate him; this rehabilitative rationale is not only desirable, but it is constitutionally required. *Balla v. Idaho State Bd. of Cors.*, 595 F. Supp. 1558 (D. Idaho 1984) *Balla v. Idaho State Bd. of Cors.*, 869 F.2d 461 (9th Cir. 1988).

Notwithstanding the dilemma posed where little rehabilitation allegedly is available in the penitentiary in which defendant is confined, and where this section places stringent requirements for defendant's possible release on parole, two-year minimum periods of confinement with regard to convictions on two counts of lewd conduct with a minor were reasonable sanctions for the crimes committed, and the aggregate 15-year maximum terms were reasonable outside limits of custody where defendant fails to demonstrate that he can be returned safely to the community at an earlier time. *State v. Smith*, 117 Idaho 657, 791 P.2d 38 (Ct. App. 1990).

This section does not require that the Board of Corrections provide specialized treatment for sex offenders, and with regard to cruel and unusual punishment, Const., Art. I, § 6, is not violated by the psychological evaluation required by this section before sex offenders can be paroled. *Stillwell v. State*, 124 Idaho 366, 859 P.2d 964 (Ct. App. 1993), *cert. denied*, 511 U.S. 1056, 114 S. Ct. 1619, 128 L. Ed. 2d 345 (1994).

Constitutionality.

Since parole, unlike the executive powers of commutation and pardon, is within the legislative scope of establishing suitable punishment for various crimes, former law regarding parole rules and regulations did not violate the constitutional provision (Art. 2, § 1) that no branch of government may exercise the power properly charged to another branch. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

The provision of former law that a prisoner serve one-third of his sentence, if convicted of certain named crimes, before he is eligible for parole did not violate the constitutional requirement (Art. 3, § 16) that each statute be concerned with but one topic, since the legislature possesses wide discretion in the classification of crimes. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

Equal Protection.

Where a convicted person was sentenced to concurrent terms for a period not to exceed ten years on a manslaughter charge and for a period not to exceed ten years on an assault charge, the prisoner was not denied equal protection of the law by the classification of crimes established in former law regarding rules and regulations regarding parole, in

view of the legislative authority to classify crimes as to the gravity of the acts and to provide longer terms of imprisonment for the more serious crimes. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

Hearing.

Commission rule requiring that inmate

falling within restrictions of former similar section should receive primary interview within two months of eligibility for parole only established the time at which a primary hearing was to be held, and did not pertain to the time at which a parole hearing was to be held. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (1983).

DECISIONS UNDER PRIOR LAW

ANALYSIS

In general.

Judicial review.

Presentence report.

Sentence for more than 30 years.

Statement of reasons.

In General.

A petition for a writ of habeas corpus brought on the theory that a sentence for not to exceed sixty years was invalid as, under such a sentence, the prisoner would not be eligible for parole until he had served twenty years while, under a sentence for life, he would be eligible in ten years was prematurely brought when filed before the prisoner had served ten years. *King v. State*, 91 Idaho 97, 416 P.2d 44 (1966).

Parole is within the legislative scope of establishing suitable punishment for crimes inasmuch as parole differs from pardon and commutation in that the parole merely allows the convicted party to serve part of his sentence outside the penitentiary but does not pardon him of his guilt or commute any portion of his sentence. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

Judicial Review.

The parole board has broad discretion and in reviewing a parole board's decision a court may not substitute its judgment for that of the board. Therefore, the scope of judicial review is limited to determining whether the information relied on by the parole board was sufficient to provide a factual basis for the reasons given. *Ybarra v. Dermitt*, 104 Idaho 150, 657 P.2d 14 (1983).

Presentence Report.

The parole board's reliance on a presentence report, which included two letters received from police officers recommending against parole, was sufficient to establish a rational basis for the board's decision denying parole; even though the letters contained hearsay and unsubstantiated allegations, they could be taken into account by the parole board since the letters were available and were considered by the sentencing judge. *Ybarra v. Dermitt*, 104 Idaho 150, 657 P.2d 14 (1983).

Sentence for More Than 30 Years.

Where defendant sentenced for 60 years for second degree murder would be eligible for parole after serving one-third of his sentence, while those sentenced for life become eligible after 10 years, any sentence of 30 years or more for purposes of parole eligibility must be treated as effective life sentence. *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969); *State v. Butler*, 93 Idaho 492, 464 P.2d 931 (1970); *Pulver v. State*, 93 Idaho 687, 471 P.2d 74 (1970), overruled on other grounds, *State v. Tucker*, 97 Idaho 8, 539 P.2d 556 (1975).

Statement of Reasons.

Former similar section did not set forth detailed conditions and qualifications which once met entitled an inmate to an expectation of parole but merely set forth necessary conditions which must be established before parole could be granted, thereby creating only a possibility of parole; consequently, the commission was not obligated as a matter of due process to give written reasons for a denial of parole. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (1983).

Opinions of Attorney General. The Commission of Pardons and Parole has the authority to commute a death penalty, to commute a death sentence to a fixed life term, to commute an indeterminate sentence to a lesser fixed sentence, and to commute a fixed sentence to a lesser fixed sentence. OAG 84-8.

The Board of Correction has no authority to do an outright early discharge of prisoners; the power to release prisoners is vested in the Commission of Pardons and Parole, which may release prisoners on parole, or pardon or commute their sentences. OAG 87-5.

As to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

When two sentences are ordered to be

served consecutively, and when they both contain fixed and indeterminate terms, the fixed sentences must be served first, one after the other. Then, the parole commission shall determine when and if parole will be granted at any time during the pendency of the consecutive indeterminate terms in a single proceeding. OAG 92-1.

The Commission of Pardons and Parole

may commute an indeterminate sentence to a lesser fixed term for the purpose of complying with the Prisoner Transfer Treaty between the United States and Mexico. OAG 93-3.

The Idaho Commission for Pardons and Parole does have the power to commute a sentence during a fixed term under the Unified Sentencing Act. OAG 94-3.

20-224. Information regarding prisoners to be secured. — Within six (6) months after his admission and at such intervals thereafter as it may determine, the board shall secure all pertinent available information regarding each prisoner, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment and attitude in prison, and reports of such physical and mental examinations as have been made to assist the board in prescribing treatment for such person while in confinement and to assist the commission in its deliberations. The board and the commission shall attempt to inform themselves as to such inmate as a personality and may seek from the sentencing judge, prosecuting attorney, defense counsel and law enforcement authorities such information of which they may be possessed relative to the convicted person and the crime for which he was committed. An electronic recording or transcript of the comments and arguments required to be recorded by section 19-2515, Idaho Code, shall be submitted to the board, made available to the commission, and shall be considered by the commission in making a parole or commutation decision with respect to the prisoner. [1947, ch. 53, § 24, p. 59; am. 1980, ch. 297, § 7, p. 768; am. 1984, ch. 230, § 2, p. 549.]

Compiler's notes. Section 8 of S.L. 1980, ch. 297 repealed § 20-225.

Section 9 of S.L. 1980, ch. 297 is compiled as § 20-227.

Section 1 of S.L. 1984, ch. 230 is compiled as § 19-2515.

Cited in: Whitehawk v. State, 119 Idaho 168, 804 P.2d 341 (Ct. App. 1991).

ANALYSIS

Denial of parole.

— Effect.

Due process.

Presentence report.

Denial of Parole.

— Effect.

Information that an inmate is a suspect in another, as yet uncharged, crime is relevant to parole decision and a rule that a denial of parole following the commission's receipt of such information will constitute an "arrest" for the uncharged offense would hamper the functions of both the Probation and Parole Commission and law enforcement authorities and the denial of parole to defendant was not the equivalent of an arrest for the sexual offense that remained under investigation,

his continued incarceration was for the burglary conviction and was not pretrial detention for the uncharged sex offense, and defendant's sixth amendment rights were not implicated until formal charges were filed. State v. Brashier, 127 Idaho 730, 905 P.2d 1039 (Ct. App. 1995).

Due Process.

Because the inmate failed to establish that the inmate had a constitutionally protected liberty interest in receiving a parole hearing as soon as the inmate became parole-eligible and because the Idaho Parole Commission was statutorily allotted six months in which to gather information relevant to its decision on whether to grant or deny parole to an inmate, the inmate's right to due process was not violated by the Commission's refusal to consider him for parole until he had served six months in prison. Duvalt v. Sonnen, 137 Idaho 548, 50 P.3d 1043 (Ct. App. 2002).

Presentence Report.

The parole board's reliance on a presentence report, which included two letters received from police officers recommending against parole, was sufficient to establish a rational basis for the board's decision deny-

ing parole; even though the letters contained hearsay and unsubstantiated allegations, they could be taken into account by the parole board since the letters were available and

were considered by the sentencing judge. *Ybarra v. Dermitt*, 104 Idaho 150, 657 P.2d 14 (1983).

20-225. Payment for cost of supervision. — Any person under state probation or parole supervision shall be required to contribute not more than forty dollars (\$40.00) per month as determined by the board of correction. Costs of supervision are the direct and indirect costs incurred by the department of correction to supervise probationers and parolees, including tests to determine drug and alcohol use, books and written materials to support rehabilitation efforts, and monitoring of physical location through the use of technology. Any failure to pay such contribution shall constitute grounds for the revocation of probation by the court or the revocation of parole by the commission for pardons and parole. The division of probation and parole in the department of correction may exempt a person from the payment of all or any part of the foregoing contribution if it finds any of the following factors to exist:

(1) The offender has diligently attempted but been unable to obtain employment.

(2) The offender has an employment handicap, as determined by a physical, psychological, or psychiatric examination acceptable to the division of probation and parole.

Money collected as a fee for services will be placed in the probation and parole receipts account, which is hereby created in the dedicated fund in the state treasury, and utilized to provide supervision for clients. Moneys in the probation and parole receipts account may be expended only after appropriation by the legislature. [I.C., § 20-225, as added by 1984, ch. 187, § 1, p. 436; am. 2003, ch. 130, § 1, p. 383.]

Compiler's notes. Former § 20-225, which comprised S.L. 1947, ch. 53, § 25, p. 59, was repealed by S.L. 1980, ch. 297, § 8.

Section 2 of S.L. 1984, ch. 187 which provided that this section was repealed on June 30, 1988 was repealed by § 4 of S.L. 1987, ch. 266.

Section 2 of S.L. 2003, ch. 130 declared an emergency. Approved March 27, 2003.

Sec. to sec. ref. This section is referred to in § 19-5302.

dant the amount defendant paid for supervised probation when the conviction and sentence under which the defendant was placed on probation was subsequently reversed on appeal and the underlying criminal charge dismissed, for even though his conviction was set aside and the criminal charge was dismissed, the State in fact provided the supervision service. *State v. Walker*, 126 Idaho 508, 887 P.2d 53 (Ct. App. 1994).

Reversal of conviction.

The State did not need to refund to defen-

20-225A. Payment for interstate compact application. — (1) Any person under state probation or parole supervision who applies for a transfer of supervision to another state shall be required to post an application fee not to exceed one hundred dollars (\$100).

(2) Money collected as a fee for services and compact administration shall be placed in the probation and parole receipts account, which is hereby created in the dedicated fund in the state treasury, and shall be utilized to

provide supervision for offenders. Moneys in the probation and parole receipts account may be expended only after appropriation by the legislature. [I.C., § 20-225A, as added by 2003, ch. 25, § 1, p. 94.]

Compiler's notes. Section 2 of S.L. 2003, ch. 25 declared an emergency. Approved February 20, 2003.

20-226. Records of prisoners. — The state board of correction shall cause a complete record to be kept of every prisoner committed to its custody. Such record shall be organized in accordance with the most modern method of filing and indexing so that there will always be immediately available a complete history on each prisoner. Such records shall be subject to disclosure according to chapter 3, title 9, Idaho Code. [1947, ch. 53, § 26, p. 59; am. 1970, ch. 143, § 9, p. 425; am. 1990, ch. 213, § 15, p. 480.]

Compiler's notes. Section 8 of S.L. 1970, ch. 143 is compiled as former § 20-223 and § 10 as § 20-234.

Sections 14 and 16 of S.L. 1990, ch. 213 are compiled as §§ 20-213A and former 22-609, respectively.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

20-227. Arrest of parolee, probationer or person under drug court supervision without warrant — Agent's warrant — Detention — Report to commission or court. — (1) Any parole or probation officer may arrest a parolee, probationer, or person under drug court supervision without a warrant, or may deputize any other officer with power of arrest to do so, by giving such officer a written statement hereafter referred to as an agent's warrant, setting forth that the parolee, probationer, or person under drug court supervision has, in the judgment of said parole or probation officer, violated the conditions of drug court or conditions of his parole or probation.

(2) Such written statement or agent's warrant, delivered with the parolee, probationer, or person under drug court supervision by the arresting officer to the official in charge of the institution from which the parolee was released, the county jail or other place of detention, shall be sufficient warrant for the detention of the probationer, parolee, or person under drug court supervision.

(3) The agent's warrant issued by the parole or probation officer shall be sufficient authorization for a local law enforcement officer to transport the probationer, parolee, or person under drug court supervision to the appropriate jurisdiction to be housed pending appearance before the sentencing court or the commission.

(4) The parole and probation officer shall at once notify the commission, or the court, of the arrest and detention of the parolee, probationer, or person under drug court supervision, and shall submit in writing a report showing in what manner the parolee, probationer, or person under drug court supervision is alleged to have violated the condition of his or her parole, probation, or drug court program.

(5) In counties where there are misdemeanor probation officers in addition to department of correction parole or probation officers, those officers shall have the same authority conferred upon department of correction parole or probation officers in this section, to arrest a misdemeanor probationer without a warrant for misdemeanor probation violations occurring in the officer's presence as otherwise provided in this section. [1947, ch. 23, § 27, p. 59; am. 1980, ch. 297, § 9, p. 768; am. 1994, ch. 424, § 1, p. 1332; am. 1999, ch. 300, § 1, p. 752; am. 2004, ch. 227, § 2, p. 669.]

Compiler's notes. Section 7 of S.L. 1980, ch. 297 is compiled as § 20-224.
Section 8 of S.L. 1980, ch. 297 repealed former § 20-225.
Section 2 of S.L. 1994, ch. 424 declared an emergency. Approved April 7, 1994.
Section 1 of S.L. 2004, ch 227 is compiled as § 6-904A.

Section 3 of S.L. 2004, ch. 227 declared an emergency. Approved March 23, 2004.
Cited in: Shouse v. Ljunggren, 792 F.2d 902 (9th Cir. 1986); Gawron v. Roberts, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987).

20-228. Conditions of parole to be specified in writing — Warrant for arrest of suspected violators — Effect of suspension and arrest.
— The commission for pardons and parole, in releasing a person on parole, shall specify in writing the conditions of parole, and a copy of such conditions shall be given to the person paroled. Whenever the commission finds that a parolee may have violated the conditions of parole, the written order of the commission, signed by a member or members of the commission or the executive director, shall be sufficient warrant for any law enforcement officer to take into custody such person, and it is hereby made the duty of all sheriffs, police, constables, parole and probation officers, prison officials and other peace officers, to execute such order. Such warrant shall serve to suspend the person's parole until a determination on the merits of the allegations of the violation has been made pursuant to a revocation hearing. From and after the issuance of the warrant and suspension of the parole of any convicted person and until arrest, the parolee shall be considered a fugitive from justice. Such person so recommitted must serve out the sentence, and the time during which such prisoner was out on parole shall not be deemed a part thereof; unless the commission, in its discretion, shall determine otherwise, but nothing herein contained shall prevent the commission from again paroling such prisoners at its discretion. [1947, ch. 53, § 28, p. 59; am. 1970, ch. 105, § 1, p. 263; am. 1980, ch. 297, § 10, p. 768; am. 1994, ch. 171, § 3, p. 382; am. 1998, ch. 327, § 2, p. 1055.]

Compiler's notes. Section 2 of S.L. 1970, ch. 105 repealed former § 20-229.
Section 2 of S.L. 1994, ch. 171 is compiled as § 20-213A.
Sections 1 and 3 of S.L. 1998, ch. 327 are compiled as §§ 20-223 and 6-904B, respectively.
Cited in: Shouse v. Ljunggren, 792 F.2d 902 (9th Cir. 1986).

Computing maximum sentence.
Conditions of parole.
— Board recommendations.
— Reasonable.
— Revocation.
— Summary approval.
Credit.
Effect of revocation.

Constitutionality.
This section, which provides that the time spent on parole shall not be considered to have been served as a part of a prisoner's

ANALYSIS
Constitutionality.
Constitutional limitation.

sentence when that prisoner is recommitted following a parole violation, is constitutional and does not violate the separation of powers doctrine of Const., Art. 2, § 1. *Flores v. State*, 109 Idaho 182, 706 P.2d 71 (Ct. App. 1985).

Constitutional Limitation.

Because it is apparent that time on parole is a form of punishment, the Eighth Amendment of the United States Constitution potentially limits the impact of this section. *Winter v. State*, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

Computing Maximum Sentence.

Neither § 20-233 nor § 20-239 speaks to how one's maximum sentence shall be computed, and when it will expire if parole has been granted but subsequently revoked. This section is the only section which speaks to this question, and its plain language need not be modified by judicial construction to accommodate the other statutes; accordingly a judicially created exception to the express language of this section was not proper where it permitted a defendant's parole time to count together with his prison time in calculating the duration of his sentence. *Winter v. State*, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

Conditions of parole.

—Board Recommendations.

Although only the Commission for Pardons and Parole may impose substantive, rehabilitative conditions of parole, the Board of Correction may recommend substantive conditions, and the Commission may delegate to its executive director the authority to act in its behalf in approving the Board's recommended parole conditions. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

—Reasonable.

The intensive supervision program conditions of parole authorizing warrantless

searches, requiring the payment of fees to defray costs of supervision, restricting the use of alcohol, and establishing a curfew and geographic restrictions were reasonable, were possible to perform, and had an acceptable aim toward rehabilitation. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

—Revocation.

The Commission for Pardons and Parole's act of revoking the defendant's parole for violating conditions recommended by the Board of Correction and approved by the Commission's executive director could be inferred as a ratification of the director's approval. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

—Summary Approval.

The Commission for Pardons and Parole is not prohibited from summarily approving recommended parole conditions. All that is statutorily required of the Commission is to specify in writing the parole conditions; consequently, written parole conditions may be administratively accepted and approved. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Credit.

Inmate's claim pertaining to Sentence 1 was properly dismissed where the Idaho Commission of Pardons and Paroles had no authority in 1997 to permit credit against a sentence in the commission's discretion. *Acheson v. Klauser*, — Idaho —, 75 P.3d 210 (Ct. App. 2003).

Effect of Revocation.

Where one's parole has been revoked, a credit against one's sentence for time spent on parole is statutorily precluded. *Winter v. State*, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

20-228A. Parole subpoena to assist in apprehending parole absconders. — For the purpose of assisting with apprehending individuals on parole who have absconded and for whom the parole commission has issued a warrant of arrest, the director of the department of correction shall have power to issue a subpoena duces tecum to compel the production of writings, documents or records of any type or form, specifically including those stored or transmitted by any electronic or wireless means. If any person or entity to whom such subpoena is directed refuses to produce the documents, writings or records sought, as directed, within seven (7) days of receipt of the subpoena, the director may apply to the district court of the county where the records are located for an order compelling such person or entity to comply with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. [I.C., § 20-228A, as added by 2004, ch. 296, § 1, p. 826.]

20-229. Parole revocation hearing. — Whenever a paroled prisoner is accused of a violation of parole, other than by absconding supervision or the commission of, and conviction for, a felony or misdemeanor offense under the laws of this state, or any other state, or any federal laws, the parolee shall be entitled to a fair and impartial hearing of such charges within thirty (30) days from the date the accused is served with the charges of the violation of conditions of parole subsequent to arrest and detention. The hearing shall be held before one (1) or more members of the commission for pardons and parole, or before an impartial hearings officer selected by the executive director. Such hearing shall be held at a place or places, within this state, reasonably near the site of the alleged violation or violations of parole. If the parolee has been supervised outside of the state of Idaho and such violations occurred outside of Idaho, the executive director or hearing officer shall determine the location of the hearing.

Whenever a paroled prisoner is accused of a violation of parole by absconding supervision or the commission of, and conviction for, a felony or misdemeanor offense under the laws of this state, or any other state, or any federal laws, the parolee shall be entitled to a fair and impartial hearing within a reasonable time from the date the accused is served with such charges. The location of such hearing shall be determined by the executive director or hearing officer. [I.C., § 20-229, as added by 1970, ch. 105, § 3, p. 263; am. 1975, ch. 247, § 1, p. 661; am. 1980, ch. 297, § 11, p. 768; am. 1994, ch. 171, § 4, p. 382.]

Compiler's notes. A former § 20-229 which comprised, S.L. 1947, ch. 53, § 29, p. 59, was repealed by S.L. 1970, ch. 105, § 2.

Section 2 of S.L. 1975, ch. 247 provided that the act should take effect on and after July 1, 1975.

Cited in: Schwartzmiller v. Winters, 99 Idaho 18, 576 P.2d 1052 (1978); Shouse v. Ljunggren, 792 F.2d 902 (9th Cir. 1986).

ANALYSIS

Saving construction.
Time served during revoked parole.

Saving Construction.

Although a judge may apply a saving construction to a statute if its language, although clear, would lead to absurd results which the legislature obviously could not have intended,

this section does not so invite a saving construction. *Winter v. State*, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

Time Served During Revoked Parole.

It would be difficult to write clearer or more emphatic language than that by which this section precludes any credit for time served during a revoked parole and this preclusion is not diluted by the section's ensuing provision that the parole commission, in the exercise of its discretion, may parole an individual "again"; this is simply an affirmation of the commission's power to grant parole whenever it deems the circumstances to be appropriate and it cannot be read reasonably to derogate from the statute's plain thrust — that time spent during a revoked parole cannot be credited against the sentence. *Winter v. State*, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Constitutional amendment.
Notice of hearing.
Retroactive provision.
Revocation of good time.
Witnesses.

Constitutional Amendment.

The 1946 amendment to Const., Art. 4, § 7 does not apply to offenses or convictions prior

thereto; hence appellant who started to serve sentence of not less than 10 or more than 12 years on May 6, 1942 did not lose substantive rights under former I.C.A., §§ 20-417 and 20-419 (repealed). *Ex parte Dalton*, 73 Idaho 542, 255 P.2d 333 (1953).

Notice of Hearing.

Prisoner is entitled to have notice of hearing by board for revocation of good time and is

entitled to be present at the hearing before any good time of prisoner can be revoked. *Ex parte Dalton*, 72 Idaho 451, 243 P.2d 594 (1952).

Retroactive Provision.

Provision in this section requiring a hearing before the board of correction before revocation of any good time was retroactive, even though Good Time Statute was repealed by Acts 1947, ch. 53, § 46. *Ex parte Dalton*, 72 Idaho 451, 243 P.2d 594 (1952).

Revocation of Good Time.

Where board revoked good time earned by appellant from May 6, 1942 until August 3, 1949 for misconduct, and there was no revo-

cation of good time earned since August 3, 1949 the appellant was entitled to release where good time earned since August 3, 1949 was sufficient to complete service of sentence at time of application and hearing for release. *Ex parte Dalton*, 73 Idaho 542, 255 P.2d 333 (1953).

Witnesses.

There is no constitutional right to compel witness attendance at a parole revocation hearing. *Smith v. Idaho Dep't of Cor.*, 128 Idaho 768, 918 P.2d 1213 (1996).

Collateral References. Withdrawal, modification or denial of good-time allowance to prisoner. 95 A.L.R.2d 1265.

20-229A. Notice — Service — Waiver. — Within fifteen (15) calendar days following arrest and detention on a warrant issued by the Idaho commission for pardons and parole, the alleged parole violator shall be personally served with a copy of the factual allegations of the violation of the conditions of parole by a state probation and parole officer, a law enforcement official or other as designated by the executive director. When accused of a violation of his parole, other than by absconding supervision or the commission of, and conviction for, a felony or misdemeanor, the alleged parole violator shall be advised of the right to an on-site parole revocation hearing and of procedural rights and privileges as provided by this act. The alleged parole violator, after service of the allegation of violations of the conditions of parole and the notification of rights may waive the on-site parole revocation hearing as provided by section 20-229, Idaho Code. If the alleged parole violator waives the right to an on-site hearing, the commission, executive director or hearing officer shall designate the facility where the hearing will be conducted.

Whenever a paroled prisoner is accused of a violation of his parole by absconding supervision or the commission of, and conviction for, a felony or misdemeanor under the laws of this state, or any other state, or any federal laws, and following arrest and detention on a warrant issued by the Idaho commission for pardons and parole, the alleged parole violator shall be personally served with a copy of the factual allegations of the violation of the conditions of parole within a reasonable time. The alleged parole violator shall be advised of the right to a hearing and all other rights and privileges as provided by this act. The executive director or hearing officer shall designate the facility where the hearing will be conducted. A fair and impartial hearing of the charges will be conducted within a reasonable time.

The alleged parole violator may waive the right to any hearing, and at that time may admit one (1) or more of the alleged violations of the conditions of parole. If the waiver is accepted by the commission or hearing officer: (i) the parolee may be reinstated under the same or modified conditions, or (ii) the parole shall be revoked and the parolee remanded to custody. If all waivers made by the parolee are rejected by the commission or designated hearing officer, a parole revocation hearing shall be held either on-site or at a penitentiary facility. [I.C., § 20-229A, as added by

1970, ch. 105, § 4, p. 263; am. 1980, ch. 297, § 12, p. 768; 1983, ch. 249, § 1, p. 670; am. 1994, ch. 171, § 5, p. 382.]

Compiler's notes. The words "this act" refer to S.L. 1970, ch. 105; compiled herein as §§ 20-228 — 20-229B.

Cited in: Gawron v. Roberts, 113 Idaho 330, 743 P.2d 983 (Ct. App. 1987).

ANALYSIS

Notice.
Witnesses.

Notice.

Under this section, a sheriff is not required

to provide the defendant with notice of the claimed parole violation, nor advise him of his right to a parole revocation hearing. *Shouse v. Ljunggren*, 792 F.2d 902 (9th Cir. 1986).

Witnesses.

There is no constitutional right to compel witness attendance at a parole revocation hearing. *Smith v. Idaho Dep't of Cor.*, 128 Idaho 768, 918 P.2d 1213 (1996).

20-229B. Commission rulings. — After a factual parole revocation hearing has been concluded, the member or members of the commission for pardons and parole or the designated hearing officer, having heard the matter, shall enter a decision within twenty (20) days. If the member or members or hearing officer, having heard the matter, should conclude that the allegations of violation of the conditions of parole have not been proven by a preponderance of the evidence, or those which have been proven by a preponderance of the evidence are not sufficient cause for the revocation of parole, then the parolee shall be reinstated on parole on the same or modified conditions of parole. If the member or members or hearing officer, having heard the matter, should conclude that the allegations of violation of the conditions of parole have been proven by a preponderance of the evidence and constitute sufficient cause for the revocation of parole, then a dispositional hearing shall be convened during a regular session of the commission to execute an order of parole revocation and determine the period of time the parole violator shall be returned to state custody. [I.C., § 20-229B, as added by 1970, ch. 105, § 5, p. 263; am. 1994, ch. 171, § 6, p. 382.]

Compiler's notes. Section 6 of S.L. 1970, ch. 105 declared an emergency. Approved March 5, 1970.

ANALYSIS

Applicability of rules of evidence.
Clarification of findings.
Drug tests.
Standard of review.
Witnesses.

Applicability of Rules of Evidence.

The Rules of Evidence applicable to a judicial proceeding need not be observed at a parole revocation hearing. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Clarification of Findings.

There is nothing which indicates that a court cannot remand to clarify findings, so long as the Parole Commission does not take

additional evidence to supplement the record without providing a parolee due process. The record did not show that the commission supplemented the record in any way and accordingly the magistrate's decision to remand the case without specifically delineating due process protections was sustained. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Drug Tests.

There was substantial evidence in the record to support the Parole Commission's finding that defendant used cannabinoids in violation of his parole agreement. Defendant took two drug tests, over six months apart, and failed both, even though the test was designed to eliminate the possibility that passive inhalation would register. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Standard of Review.

A finding by the Parole Commission that a parole violation has occurred will not be overturned unless the reviewing court can say that the finding represents an abuse of discretion. An abuse of discretion will occur only if the finding of a violation is not supported by substantial reliable evidence or if the procedures followed deprive the parolee of due process. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

The plenary authority of the Parole Commission should not be disturbed in the absence of a clear abuse of its rightful discretion.

The magistrate applied the correct standard of review to the commission's decision to revoke parole once the magistrate was satisfied that there was sufficient evidence in the record to support the finding that a parole violation had occurred. *Craig v. State*, 123 Idaho 121, 844 P.2d 1371 (Ct. App. 1992).

Witnesses.

There is no constitutional right to compel witness attendance at a parole revocation hearing. *Smith v. Idaho Dep't of Cor.*, 128 Idaho 768, 918 P.2d 1213 (1996).

20-230. Application to convictions prior to act. — Provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the state penitentiary to the end that at all times the same provisions relating to sentences, imprisonment, and paroles of prisoners shall apply to the inmate thereof. [1947, ch. 53, § 30, p. 59; am. 1980, ch. 297, § 13, p. 768.]

Compiler's notes. For words "this act" see compiler's notes, § 20-211.

Cited in: *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955).

ANALYSIS

Work release program.

— Ex post facto law.

Work Release Program.**— Ex Post Facto Law.**

The change in the State Correctional Institution policy discontinuing the work release program was not an ex post facto law and did not violate this section. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

20-231. Immunity from parole or release of a prisoner. — Neither a public entity nor a public employee or servant shall be financially responsible or liable for any injury resulting from determining whether to parole or release a prisoner or from determining the terms or conditions of his parole or release or from determining whether to revoke his parole or release. [I.C., § 20-231, as added by 1980, ch. 297, § 15, p. 768.]

Compiler's notes. Former § 20-231, which comprised S.L. 1947, ch. 53, § 31, p. 59, was repealed by S.L. 1980, ch. 297, § 14.

Cited in: *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

ANALYSIS

Tort claims act.

Unescorted pass.

Tort Claims Act.

The immunity granted in this section is not

affected by the Tort Claims Act. *Pritchard v. State*, 115 Idaho 111, 765 P.2d 136 (1988).

Unescorted Pass.

Where an inmate was given an 8-hour pass, he escaped, and raped the plaintiff, this section granted the Board of Corrections immunity from tort liability as the 8-hour unescorted pass was a "release". *Walton v. State*, 112 Idaho 503, 733 P.2d 724 (1987).

20-232. Remission of fine or penalty certified to court. — Upon the remission of a fine or penalty by the commission, it shall be the duty of the commission forthwith to certify the same to the clerk of the court, where said fine or forfeiture was adjudged, who shall file the same in his office, and said proceedings shall constitute a satisfaction of the judgment. [1947, ch. 53,

§ 32, p. 59; am. 1969, ch. 419, § 6, p. 1160; am. 1980, ch. 297, § 16, p. 768.]

20-233. Final discharge of parolee — Minimum term. — When any paroled prisoner has performed the obligations of his parole for such time as shall satisfy the commission that his final release is not incompatible with his welfare and that of society, the commission may make the final order of discharge and issue to the paroled prisoner a certificate of discharge; but no such order of discharge shall be made in any case within a period of less than one (1) year after the date of release on parole, except that when the period of the maximum sentence provided by law shall expire at an earlier date, then a final order of discharge must be made and a certificate of discharge issued to the paroled prisoner not later than the date of expiration of said maximum sentence. [1947, ch. 53, § 33, p. 59; am. 1980, ch. 297, § 17, p. 768.]

Cited in: State v. Snapp, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987); Bates v. Murphy, 118 Idaho 239, 796 P.2d 116 (1990).

ANALYSIS

Computing sentence when parole revoked.
Parole implications.

Computing Sentence When Parole Revoked.

Neither this section nor § 20-239 speaks to how one's maximum sentence shall be computed, and when it will expire, if parole has been granted but subsequently revoked. The only section which speaks to this question is § 20-228 and its plain language need not be modified by judicial construction to accommodate the other statutes; accordingly a judicially created exception to the express language of this section was not proper where it permitted a defendant's parole time to count together with his prison time in calculating the duration of his sentence. Winter v. State, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

Parole Implications.

At the time of defendant's change of plea, the court was neither constitutionally required nor mandated by Idaho law to inform

defendant of the parole implications of this section before accepting his plea of guilty. Gee v. State, 117 Idaho 107, 785 P.2d 671 (Ct. App. 1990).

Opinions of Attorney General. As a statutory entity with authority to make decisions concerning paroles, pardons and commutations, the Commission of Pardons and Parole is subject to the Open Meeting Law and is required to open all meetings to the public except those conducted in executive session. OAG 85-9.

As to sentences imposed for crimes committed prior to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

The Commission of Pardons and Parole may commute an indeterminate sentence to a lesser fixed term for the purpose of complying with the Prisoner Transfer Treaty between the United States and Mexico. OAG 93-3.

20-234. Parole information to be transmitted to the sheriff and county prosecutor. — Whenever any person committed to the custody of the state board of correction shall have been granted a parole by the commission, it shall be the duty of the commission to transmit to the sheriff and the prosecuting attorney of the county within which said prisoner shall be paroled, a copy of the parole agreement, and information as to the place of residence of said prisoner within said county and the sheriff shall notify local law enforcement and other pertinent agencies. [1947, ch. 53, § 34, p. 59; am. 1970, ch. 143, § 10, p. 425; am. 1974, ch. 6, § 6, p. 28; am. 1980, ch. 297, § 18, p. 768; am. 1984, ch. 85, § 1, p. 168.]

Compiler's notes. Section 9 of S.L. 1970, ch. 143 is compiled as § 20-226 and § 11 as § 20-237.

Section 5 of S.L. 1974, ch. 6 is compiled as § 20-218.

Cited in: *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).

20-235. Certification and warrants for expenses. — The chairman of the state board of correction, or his designee, is hereby authorized to certify all sums to be expended by said board in carrying out the purpose of this act to the state board of examiners, and the state board of examiners, upon the approval of said sums, shall cause the state controller to draw warrants for the amount of the same. [1947, ch. 53, § 35, p. 59; am. 1974, ch. 6, § 7, p. 28; am. 1994, ch. 180, § 12, p. 420.]

Compiler's notes. For words "this act" see compiler's note, § 20-211.

Section 8 of S.L. 1974, ch. 6 was repealed.

Sections 11 and 13 of S.L. 1994, ch. 180 are compiled as former §§ 20-102 and 22-105, respectively.

Section 14 of S.L. 1974, ch. 6 provided the act should be in full force and effect on and after July 1, 1974.

Section 241 of S.L. 1994, ch. 180 provided

that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 12 of S.L. 1994, ch. 180 became effective January 2, 1995.

20-236. Members or employees of board not to be interested in contracts — Penalty for violation. — No member or employee of the state board of correction shall be interested directly or indirectly in any manner in contracts for furnishing the penitentiary or any property used in connection therewith or inmates thereof, any supplies, materials, equipment, or for the use of said institution. Nor shall any officer or employee be permitted to receive in any way perquisites for themselves or family, or any compensation or reward from any contractor or employee or other person. Should any officer or employee violate, or wilfully or negligently fail to observe the provisions and prohibitions of this section, he shall be at once dismissed from office by the state board of correction; and further, upon conviction of such violation by a court of competent jurisdiction, he shall be fined a sum not exceeding \$1,000.00 and not less than one month's pay, and shall forfeit his interest in any and all contracts or rewards he may have received or agreed to receive in violation of the provisions of this section. [1947, ch. 53, § 36, p. 59.]

20-237. Transmission of convicted persons to penitentiary or custody of board — Notice of conviction to director — Transported by guards — Time for notice. — When any person is convicted in any court of the state and sentenced to imprisonment and committed to the custody of the state board of correction, or sentenced to suffer the death penalty, the sheriff of the county in which such conviction shall have been had shall immediately, upon passing of sentence, notify the director that a person is in his custody. Such notice shall be transmitted by either telegraph or telephone, followed by a written confirmation by certified mail. As soon as possible upon receipt of such notice, the director shall dispatch one or more

correctional officers, as may be necessary, from the department to the place where the convicted person is detained, to secure and convey said convicted person to any department of correction facility, or other facility within the state designated by the state board of correction. The convicted person, a certified copy of the judgment, a copy of the presentence investigation report, if any, a copy of any disciplinary reports filed against the convicted person while in the sheriff's custody and all of the additional documents and allowable personal property, including medications as set forth in section 20-243, Idaho Code, shall be delivered into the custody of the director or his representative at the time of or prior to the delivery of the convicted person to the department. If all such records, documents, and property are not delivered at that time, the director or his representative may refuse to accept or transport the convicted person to a department facility. [1947, ch. 53, § 37, p. 59; am. 1967, ch. 364, § 3, p. 1052; am. 1969, ch. 419, § 7, p. 1160; am. 1970, ch. 143, § 11, p. 425; am. 1991, ch. 116, § 1, p. 244.]

Compiler's notes. Section 10 of S.L. 1970, ch. 143 is compiled as § 20-234 and § 12 as § 20-241.

Section 2 of S.L. 1991, ch. 116 is compiled as § 19-2519.

Section 3 of S.L. 1991, ch. 116 declared an emergency. Approved March 27, 1991.

Cross ref. Fee of sheriff for taking prisoner to or from prison, § 31-3203.

Sec. to sec. ref. This section is referred to in §§ 19-2519 and 20-237A.

Delaying Receipt of State Inmates.

The entire statutory scheme of Title 20 of the Idaho Code presupposes that state prisoners will be housed in the state prison under the control and custody of the Department of Correction and county prisoners will be housed in the county jails under the control and custody of the county sheriffs; therefore, the language "as soon as possible" contained in this section extends only to logistical and

scheduling considerations of dispatching prison personnel to various jails throughout the state, but not to other operational considerations of the penitentiary. *Killeen v. Vernon*, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

This section does not allow the Director of the Idaho Department of Correction the discretion to delay receipt of state inmates housed at the county jail until room is available at a state facility to accept them. *Killeen v. Vernon*, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

Opinions of Attorney General. It is the responsibility of the sheriff and an expense to his or her county to transport an inmate from the prison back to the county where the inmate's attendance in court is required; however, in the case of female prisoners, clear statutory language places the responsibility upon the state board of corrections. OAG 83-11.

20-237A. Funding per diem costs of state prisoners housed in county jails, related additional expenses and manner of payment. —

(a) The board of correction shall pay each county for housing prisoners convicted, sentenced and committed to the custody of the state board of correction, beginning on the day after receipt by the director of notice that a person is in custody, as provided in section 20-237, Idaho Code.

(b) The state board of correction shall pay counties housing state sentenced prisoners a minimum rate of forty dollars (\$40.00) per day, per inmate. Nothing stated herein will prohibit the state board of correction from entering into a contract with a county pursuant to section 20-241, Idaho Code.

(c) In addition to payment of per diem costs as above provided, the state board of correction shall pay for all ordinary and necessary medical and dental expenses of state prisoners housed in county jails.

(d) As between themselves, the state board of correction and each of the counties will be responsible for their pro rata share of any property damages or personal injuries arising from the housing of state sentenced prisoners, which is attributable to their respective negligence or otherwise wrongful conduct. This provision shall not alter or affect any immunities or exceptions to governmental liability the state or counties may possess as to private persons pursuant to the Idaho tort claims act, sections 6-901, et seq., Idaho Code.

(e) The legislature shall appropriate sufficient funds annually to the department of correction to make all payments to counties as required in this section.

(f) The county sheriffs shall bill the department of correction at least every sixty (60) days. The department of correction shall pay such bills within sixty (60) days of their receipt.

(g) The germane committees of the legislature shall review the costs of housing inmates in county jails every three (3) years beginning in 2004. [I.C., § 20-237A, as added by 1992, ch. 80, § 1, p. 221; am. 2000, ch. 135, § 1, p. 354.]

20-238. Clothing and transportation to be furnished prisoners upon parole or final discharge. — Upon the release of any convicted person upon parole the state board of correction shall provide him or her with necessary wearing apparel and may also provide him or her with a bus or railroad transportation ticket to the place designated for parole, together with sufficient cash to procure meals in transit. Upon final discharge from the penitentiary, the board shall provide the convicted person with similar clothing and may furnish transportation and cash for meals to his home, or to the place from which the convicted person was committed to the penitentiary. [1947, ch. 53, § 38, p. 59.]

Cited in: State v. Snapp, 113 Idaho 350, 743 P.2d 1003 (Ct. App. 1987).

20-239. Discharge upon service of maximum term. — Any convicted person undergoing sentence in the penitentiary not sooner released under the provisions of this act, shall in accordance with the provisions of existing law, be discharged from custody on serving a maximum sentence provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term. [1947, ch. 53, § 39, p. 59.]

Cited in: State v. Snapp, 113 Idaho 350,, 743 P.2d 1003 (Ct. App. 1987).

Computing Sentence When Parole Revoked.

Neither § 20-233 nor this section speaks to how one's maximum sentence shall be computed, and when it will expire, if parole has been granted but subsequently revoked. The only section which speaks to this question is § 20-228 and its plain language need not be

modified by judicial construction to accommodate the other statutes; accordingly a judicially created exception to the express language of this section was not proper where it permitted a defendant's parole time to count together with his prison time in calculating the duration of his sentence. Winter v. State, 117 Idaho 103, 785 P.2d 667 (Ct. App. 1989).

Opinions of Attorney General. As to sentences imposed for crimes committed prior

to the effective date of the Unified Sentencing Act, February 1, 1987, the Commission of Pardons and Parole may, pursuant to properly enacted rules and regulations, parole an inmate who is serving an indeterminate sentence and who has one or more consecutive

sentences remaining to be served; when paroled, such an inmate would have a dual status as a parolee on the first sentence and as an inmate on the consecutive sentence or sentences. OAG 87-9.

20-240. Respites, reprieves, commutations and pardons — Treason or impeachment. — The governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the state, except treason or imprisonment on impeachment, but such respites or reprieves shall not extend beyond the next session of the commission; and such commission shall at such session continue or determine such respite or reprieve, or may commute or pardon the offense as herein provided. In cases of conviction of treason, the governor shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next regular session, when the legislature shall either pardon or commute the sentence, direct its execution or grant a further reprieve. The commission shall have full and final authority to grant commutations and pardons except with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances. The commission shall conduct commutation and pardon proceedings pursuant to rules and regulations adopted in accordance with law and may attach such conditions as it deems appropriate in granting pardons or commutations. With respect to commutations and pardons for the offenses named above, the commission's determination shall only constitute a recommendation subject to approval or disapproval by the governor. No commutation or pardon for such named offenses shall be effective until presented to and approved by the governor. Any commutation or pardon recommendation not so approved within thirty (30) days of the commission's recommendation shall be deemed denied. [1947, ch. 53, § 40, p. 59; 1969, ch. 419, § 8, p. 1160; am. 1988, ch. 323, § 1, p. 982.]

Cross ref. Governor may grant respites and reprieves, Const., Art. 4, § 7.

Limitations on pardoning power, Const., Art. 4, § 7.

Power of Board to Grant.

The board of pardons, created by the Constitution, has power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, and the governor has the power to grant respites and reprieves. *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957).

Opinions of Attorney General. The Idaho Commission for Pardons and Parole does have the power to commute a sentence during a fixed term under the Unified Sentencing Act. OAG 94-3.

Collateral References. Reinstatement of attorney after disbarment, suspension, or resignation. 70 A.L.R.2d 268.

Pardon as restoring public office or license or eligibility therefor. 58 A.L.R.3d 1191.

20-241. Acceptance of federal or other funds or property. — The state board of correction, with the written consent of the governor, shall have the power and it shall be its duty:

1. To accept from the United States of America or any of its agencies, such funds, equipment, and supplies as may be made available to this state for

any of the purposes contemplated by law, and to enter into such contract and agreements with the United States or any of its agencies, or other states, as may be necessary, proper and convenient, not contrary to the laws of the state.

2. To enter into an agreement with the board of county commissioners of any county, or with the governing officials of any municipality of this state for the payment by said county or municipality of all or any part of the cost of performance by the state board of correction of any parole or probation services or the supervision of any parole or probation case arising within the said county or municipality, as the case may be, or the maintenance therein of work camps as authorized by law.

3. To accept any grant or donation of land or any gift of money or valuable thing made to the state for any of the purposes contemplated by law. [1947, ch. 53, § 41, p. 59; am. 1970, ch. 143, § 12, p. 425; am. 1997, ch. 223, § 2, p. 655.]

Compiler's notes. Section 11 of S.L. 1970, ch. 143 is compiled as § 20-237 and § 13 as § 20-242.

Section 1 of S.L. 1997, ch. 223 is compiled as § 20-209.

Sec. to sec. ref. This section is referred to in § 20-237A.

Cited in: Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

20-241A. Agreements for confinement of inmates. — The state board of correction shall have the power and it shall be its duty:

(1) To determine the availability of state facilities suitable for the detention and confinement of prisoners held under authority of state law. If the state board of correction determines that suitable state facilities are not available, it may enter into an agreement with the proper authorities of the United States, another state, a political subdivision of this state or another state, or a private prison contractor, to provide for the safekeeping, care, subsistence, proper government, discipline, and to provide programs for the reformation, rehabilitation and treatment of prisoners. Facilities made available to the state board of correction by agreement may be in this state, or in any other state, territory or possession of the United States. The state board of correction shall not enter into an agreement with an authority unable to provide the degree or kind of safekeeping, care and subsistence required by state or federal laws, the constitution of the state of Idaho, the United States constitution, and the rules adopted by the state board of correction. All contracts or agreements entered into by the state board of correction and a private prison contractor shall by [be] subject to the provisions of this section and section 20-209, Idaho Code.

(a) An authority or private prison contractor, receiving physical custody for the purpose of incarceration of a person sentenced by a court under the terms of an agreement made under this section, shall be considered as acting solely as an agent of this state. This state retains jurisdiction over a person incarcerated in an institution of another state, the United States, a political subdivision of this state or another state, or of a private institution;

(b) The attorney general of this state shall enforce an agreement or contract made under this section in a civil suit.

(2) The state board of correction shall have the authority to enter into contracts with private prison contractors for the site selection, design, design/building, acquisition, construction, construction management, maintenance, leasing, leasing/purchasing, management or operation of private prison facilities or any combination of these services, subject to the following requirements and limitations:

(a) Any request for proposals, any original contract, any contract renewal, any price or cost adjustment or any other amendment to any contract for the incarceration of individuals in a private institution, shall be reviewed by the board of correction;

(b) No contract authorized by the provisions of this section shall be awarded until the private prison contractor demonstrates to the satisfaction of the state board of correction that the contractor possesses the necessary qualifications and experience to provide the services specified in the contract; that the contractor can provide the necessary qualified personnel to implement the terms of the contract; that the financial condition of the contractor is such that the terms of the contract can be fulfilled; that the contractor has the ability to comply with applicable court orders and corrections standards; and that the proposed private prison facilities or the correctional services proposed by the contractor meet constitutional minimums;

(c) No contract authorized by the provisions of this section shall be awarded until the private prison contractor demonstrates to the satisfaction of the state board of correction that the contractor can obtain insurance or provide self-insurance to indemnify the state against possible claims arising from the operation of prison facilities by the contractor, and to compensate the state for any losses incurred due to the operation of prison facilities;

(d) Contracts awarded to private prison contractors pursuant to the provisions of this section shall be entered into for a period specified in each contract, subject to availability of funds annually appropriated by the Idaho legislature for that purpose. No contract awarded pursuant to this section shall provide for the encumbrance of funds beyond the amount available for a fiscal year;

(e) A contract may provide for annual contract price or cost adjustments, except that any adjustments may be made only once each year effective on the anniversary of the effective date of the contract.

(3) Any contract between the state board of correction and a private prison contractor, whereby the contractor provides for the housing, care, and control of inmates in a nondepartmental facility operated by the contractor, shall contain, in addition to other provisions, terms and conditions;

(a) A requirement that the contractor is to provide said services in a facility which meets standards as required by the Idaho department of correction;

(b) If a private prison institution is to be located in the state of Idaho on private land, it shall be required that the contractor obtain written authorization from the governing board of any municipality in which the facility is to be located, or if the facility is not to be located within the

municipality, written authorization from the board of county commissioners of the county in which the facility is to be located;

(c) A requirement that the private prison contractor shall provide training to its personnel to a level acceptable to the Idaho department of correction. The Idaho department of correction may provide training to the personnel of a private prison contractor and may charge a reasonable fee for the training, not to exceed the cost of training. The provisions of this section shall not be construed to confer peace officer status upon any employee of the private prison contractor or to authorize the use of firearms except to prevent escape from the facility or from custody while being transported to or from the facility or to prevent an act which would cause death or serious bodily injury to any person. The provisions of this section shall not be construed to confer Idaho state employee status upon any employee of the private prison contractor;

(4) Contracts awarded under the provisions of this section shall, at a minimum, comply with the following:

(a) Provide for internal and perimeter security to protect the public, employees and inmates;

(b) Provide that the private prison contractor shall not benefit financially from the labor of inmates nor shall any inmate ever be placed in a position of authority over another inmate. Any profits realized from the operation of a prison enterprise program shall revert to the department of correction or appropriate governmental authority. Private prison contractors may work with the Idaho department of correction in setting up work and training programs. Private prison contractors shall be authorized to purchase services and commodities from the Idaho department of correction which are necessary for implementing work or training opportunities as outlined in this section;

(c) Impose discipline on inmates only in accordance with applicable Idaho department of correction rules and procedures;

(d) Provide proper food, clothing, housing and medical care as provided for in the contract.

(5) A private prison contractor, in carrying out its duties and responsibilities under contract with the state board of correction, shall not be bound by the enactments of the legislature which govern the appointment, qualifications, duties, salaries or benefits of wardens, managers or other correctional employees. No employee of the private prison contractor shall be considered an employee of the state of Idaho. A private prison contractor shall not employ any person who does not satisfy the board of correction's personnel policies.

(6) The director of the Idaho department of correction or his designee shall monitor the performance of the private prison contractor. In all such contracts the state shall retain clear supervisory and monitoring powers over the operation and management of the private institutions to insure that the inmates are properly cared for and that the employees of the facility and the public are adequately protected. Included in the powers and responsibilities of the director of the Idaho department of correction or his designee when acting as the chief contract monitor of the private prison contract are:

- (a) Approval of all inmate releases on furlough or work release;
- (b) Approval of the type of work offenders may perform pursuant to this section and review and approval of any incentive pay plan presented by the private prison contractor for offender pay;
- (c) Approval of the training program for the private prison contractor's employees;
- (d) A determination if the minimum requirements of the contract are being satisfactorily performed;
- (e) Promulgation of rules interpreting or making specific application of the provisions of this section;
- (f) A determination if appropriate policies and procedures of the Idaho department of correction are being followed by the private prison contractor and its personnel.

(7) No contract for correctional services may authorize, allow, or imply a delegation of authority or responsibility to a private prison contractor which would allow the contractor to:

- (a) Develop or implement procedures for calculating inmate release dates;
- (b) Approve the type of work inmates may perform and the wages which may be given to inmates engaging in the work;
- (c) Place an inmate under less restrictive custody or more restrictive custody or take any disciplinary actions contrary to rules and procedures approved by the Idaho department of correction;
- (d) Develop or implement procedures regarding the care, custody and treatment of inmates which are contrary to the Idaho department of correction's policies and procedures, state or federal law.

(8) Any offense, which if committed in a state institution or facility would be a crime, including escape, shall also be a crime if committed by or with regard to offenders assigned to an institution or facility operated pursuant to a contract between the state and a private prison contractor.

(9) Any reference in the Idaho Code to imprisonment in a state penitentiary, or state prison, or incarceration under the control and custody of the Idaho board of correction shall be interpreted to include incarceration in a private prison facility. [I.C., § 20-241A, as added by 1997, ch. 223, § 3, p. 655.]

Compiler's notes. The bracketed word "be" in subsection (1) was inserted by the compiler.

Section 4 of S.L. 1997, ch. 223 declared an

emergency. Approved March 20, 1997.

Sec. to sec. ref. This section is referred to in § 20-209.

20-242. Furlough. — 1. When a person is committed to the custody of the state board of correction, the board may, upon conditions which it may impose, direct that the person be permitted to continue in his regular employment, work project, or educational program, if that is compatible with the requirements of subsection 3 of this section, or may authorize the person to secure employment for himself.

2. If the board directs that the prisoner be permitted to continue in his regular employment or education, the board shall arrange for a continuation

of the employment or education so far as possible without interruption. If the prisoner does not have regular employment, and the board has authorized the prisoner to secure employment for himself, the prisoner may do so, and the board may assist him in doing so.

3. Whenever the prisoner is not employed and between the hours or periods of employment, work project, or schooling, he shall be domiciled in a jail, facility, or residence as directed by the board of correction.

4. The earnings of the prisoner shall be retained by the prisoner under such terms and conditions as the board may impose. From such earnings the board may require that:

- a. the prisoner pay an amount to the board of correction sufficient for the prisoner's board and personal expenses, both inside and outside the jail, facility, or residence, including costs of administering such prisoner's work furlough program;
- b. the prisoner provide for the reasonable and adequate support and maintenance of the prisoner's dependents;
- c. the prisoner pay preexisting debts;
- d. the prisoner deposit earnings in a financial institution.

5. If the prisoner violates the conditions established for his conduct, custody or employment, the board may order the balance of the prisoner's sentence to be spent in actual confinement.

6. The wilful failure of a prisoner to return to the place of confinement not later than the expiration of any period during which he is authorized to be away from the place of confinement under this section is an escape from the place of confinement and is punishable as provided by section 18-2505, Idaho Code.

7. A furlough may be revoked by the board at any time without notice or hearing. [1947, ch. 53, § 42, p. 59; am. 1970, ch. 143, § 13, p. 425; am. 1979, ch. 215, § 1, p. 599; am. 1984, ch. 58, § 1, p. 106.]

Compiler's notes. Section 14 of S.L. 1970, ch. 143 is compiled herein as § 20-243.

Cited in: *State v. Breeding*, 116 Idaho 569, 777 P.2d 1242 (Ct. App. 1989).

Work Release Program.

The change in the State Correctional Institution policy discontinuing the work release program was not an ex post facto law and did not violate § 20-230. *Mellinger v. Idaho Dep't of Cors.*, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988).

Subsection (7) of this section gives the State complete discretion to remove an inmate from a work release center. *Coakley v. Murphy*, 884 F.2d 1218 (9th Cir. 1989).

Opinions of Attorney General. Because a furlough is not actually a release, but simply an alternate form of continued confinement, the Board of Correction can furlough a prisoner at any time, provided the statutory directions of this section are followed. OAG 87-5.

20-242A. Inmate incentive pay. — The board of correction is hereby authorized to institute an incentive pay program for those inmates performing at a meritorious level but who are not privileged to participate in prison industry employment.

Such incentive pay shall be funded by the state penal betterment fund as provided in section 20-405.

No such incentive pay shall be paid to any inmate who is receiving pay as provided by section 20-409. Such incentive pay shall not exceed that amount

paid to inmates under the provisions of section 20-409. [I.C., § 20-242A, as added by 1970, ch. 16, § 1, p. 31; am. 1972, ch. 234, § 1, p. 615.]

Compiler's notes. Section 20-405, as referred to in this section, was repealed. See § 20-415 regarding the correctional industries betterment account.

Section 20-409, as referred to in this sec-

tion, was repealed, and compensation of inmates is now governed by § 20-412.

Section 2 of S.L. 1970, ch. 16 declared an emergency. Approved February 10, 1970.

20-243. Delivery of convicted person to penitentiary or board — Copy of commitment — Receipt for delivery of prisoner. — When any convicted person is delivered to the penitentiary or to the custody of the board of correction, the officer having the prisoner in charge shall deliver to the state board of correction or such official, as the board may designate:

- (1) A certified copy of the commitment received by such officer from the clerk of the court where the convicted person was tried, and such certified copy of the commitment shall be evidence of the fact therein contained;
- (2) A copy or summary of such medical records of the prisoner as may have been prepared or received by the agency or institution from whose custody the prisoner is being delivered, including at least a written report of any suicide attempts, abnormal behavior, seizures or other significant facts affecting the prisoner's medical condition which were observed during his confinement prior to the delivery;
- (3) All unused portions of medications prescribed to the prisoner while in custody and any legitimate prescription medication in the prisoner's possession when taken into custody;

and shall take from such official a certificate of the delivery of such convicted person. [1947, ch. 53, § 43, p. 59; am. 1970, ch. 143, § 14, p. 425; am. 1982, ch. 98, § 1, p. 277.]

Compiler's notes. Section 13 of S.L. 1970, ch. 143 is compiled as § 20-242.

Section 2 of S.L. 1982, ch. 98 declared an emergency. Approved March 18, 1982.

Section 15 of S.L. 1970, ch. 143 read: "This act shall be in full force and effect on and after July 1, 1970, except paragraph 6, section 3, of former section 19-2601, Idaho Code, which shall be in full force and effect on and after July 1, 1971."

Sec. to sec. ref. This section is referred to in § 20-237.

Opinions of Attorney General. It is the responsibility of the sheriff and an expense to his or her county to transport an inmate from the prison back to the county where the inmate's attendance in court is required; however, in the case of female prisoners, clear statutory language places the responsibility upon the state board of corrections. OAG 83-11.

20-244. Government and discipline of the correctional facility — Rules and regulations. — The state board of correction shall make and adopt such rules and regulations for the government and discipline of the correctional facility as they may consider expedient, and from time to time, change and amend the same as circumstances may require. A printed copy of the rules and regulations shall be furnished to every officer and guard at the time he is appointed, and so much thereof as relates to the duties and obligations of the convicted persons shall be given to the convicted person upon reception at the state's correctional institutions. [1947, ch. 53, § 44, p. 59; am. 1984, ch. 178, § 1, p. 425.]

Cited in: *Waggoner v. State*, 121 Idaho 758, 828 P.2d 321 (Ct. App. 1991); *Swain v. State*, 122 Idaho 918, 841 P.2d 448 (Ct. App. 1992).

20-245. Offender labor on state and community service projects.

— (1) Offender labor on state projects. The state board of correction shall have the authority to use, under such rules as they may prescribe, the labor of offenders either within or without the walls of the penitentiary and on all public works done under the direct control of the state; that offender labor under control of the state board of correction shall manufacture and repair state highway signs, except for highways and projects where federal regulations would prohibit the use of signs so manufactured; provided, that so far as practicable any manufacture conducted within the walls shall be in connection with metal motor license plates, road or street signs furnished by the state or used by its municipalities, wearing apparel, articles and containers, for state use in the various departments or institutions of the state not for sale upon the open market. When any product produced by the offender shall be used by any department or other institution of the state, the current appropriation shall receive from such department or institution such reimbursement therefor as may be fixed by the state board of correction with the approval of the state board of examiners.

(2) Offender labor on community service projects. The state board of correction shall have the authority to assign parolees under department of correction supervision, probationers under court order or department of correction supervision and offender residents of community work centers under the direction or order of the board of correction, as community service workers as set forth in section 72-102(5), Idaho Code. The state board of correction shall have the authority to charge offenders performing community service work an hourly fee in an amount to be determined by the state insurance fund, to be remitted to the state insurance fund for purposes of providing worker's compensation insurance for parolees, probationers or community work center residents assigned as community service workers. [1947, ch. 53, § 45, p. 59; am. 1957, ch. 207, § 1, p. 434; am. 2004, ch. 149, § 2, p. 479.]

Compiler's notes. Section 46 of S.L. 1947, ch. 53 provided as follows: "All acts and parts of acts in conflict herewith, including chapters 38 and 39, Title 19; Chapter 1, Title 20, excepting only Section 20-101; Chapter 3, Title 20; Chapter 4, Title 20, all Idaho Code Annotated, are hereby repealed."

Section 3 of S.L. 2004, ch. 149 declared an emergency. Approved March 23, 2004.

Section 1 of S.L. 2004, ch 149 is compiled as § 72-102.

Cross ref. Convict-made goods, §§ 20-401 — 20-419.

Cited in: *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999), (decided prior to 2004 amendment).

Injuries Noncompensable.

State penitentiary prisoner was not entitled to recover compensation for injuries sustained while working in the license plate factory under a prison work project authorized by state board of correction. *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955).

20-246. Penitentiary — Powers of board of correction. — All transactions and dealings of the state penitentiary and its properties shall be conducted in the name of the board of correction. The board shall be

capable in law of suing in all courts and places in all matters concerning the said penitentiary and is hereby authorized to sue for and recover all sums of money or property due from any person to the people of the state on account of said penitentiary. [1949, ch. 67, § 1, p. 113; am. 1969, ch. 419, § 9, p. 1160.]

Compiler's notes. Section 10 of S.L. 1969, ch. 419 declared an emergency. Approved April 7, 1969.

20-247. Transfer of prisoner to federal penal or correctional institution. — Any person committed to the state penitentiary whose presence may be seriously detrimental to the well-being of the state penitentiary or who wilfully and persistently refuses to obey the rules and regulations of the state penitentiary or who is considered an incorrigible inmate may, upon written certification from the state board of correction, be transferred to a federal penal or correctional institution, provided the attorney general of the United States accepts such application and transfer. [1963, ch. 107, § 1, p. 329.]

Cited in: VonEiselein v. Taylor, 344 F.2d 919 (10th Cir. 1965).

20-248. Contract for care of transferred prisoner. — The state board of correction is hereby authorized to contract with the attorney general of the United States or such officer as the Congress may designate under the provisions of title 18, section 5003 of the United States Code, and acts supplementary and amendatory thereof, in each individual case for the care, custody, subsistence, education, treatment and training of any prisoner transferred under the provisions of this act. The contract shall provide for the reimbursement of the United States in full for all costs or other expenses to be paid from the appropriation for the operation of the state penitentiary. The state board of corrections shall affix to such contract a copy of the commitment or commitments under which the prisoner is held and the same along with the contract of transfer shall be sufficient authority for the United States to hold said prisoner on behalf of the state of Idaho. [1963, ch. 107, § 2, p. 329.]

Compiler's notes. The words "this act" refer to S.L. 1963, ch. 107 compiled as §§ 20-247 — 20-249.

Cited in: Mahaffey v. State, 87 Idaho 233, 392 P.2d 423 (1964); VonEiselein v. Taylor, 344 F.2d 919 (10th Cir. 1965).

20-249. Transferred prisoner subject to terms of original sentence. — Any prisoner transferred under this act shall be subject to the terms of his original sentence or sentences as if he were serving the same within the confines of the Idaho state penitentiary. Nothing herein contained shall deprive such prisoner of his rights to parole or his rights to legal process in the courts of this state. [1963, ch. 107, § 3, p. 329.]

Compiler's notes. For words "this act" see compiler's note, § 20-248.

Section 4 of S.L. 1963, ch. 107 declared an emergency. Approved March 13, 1963.

Cited in: *VonEiselein v. Taylor*, 344 F.2d 919 (10th Cir. 1965).

CHAPTER 3

OUT-OF-STATE PAROLEE SUPERVISION ACT

SECTION.

20-301. Compacts with other states authorized.

20-302. Short title.

20-301. Compacts with other states authorized. — The governor of this state is hereby authorized and directed to execute a compact on behalf of the state of Idaho with any of the United States legally joining therein in the form substantially as follows:

ARTICLE I PURPOSE

The compacting states to this interstate compact recognize that each state is responsible for the supervision of adult offenders in the community who are authorized pursuant to the bylaws and rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision authority in an orderly and efficient manner, and when necessary return offenders to the originating jurisdictions. The compacting states also recognize that congress, by enacting the crime control act, 4 U.S.C. section 112 (1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime. It is the purpose of this compact and the interstate commission created hereunder, through means of joint and cooperative action among the compacting states: to provide the framework for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states; and to equitably distribute the costs, benefits and obligations of the compact among the compacting states. In addition, this compact will: create an interstate commission which will establish uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies which will promulgate rules to achieve the purpose of this compact; ensure an opportunity for input and timely notice to victims and to jurisdictions where defined offenders are authorized to travel or to relocate across state lines; establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials, and regular reporting of compact activities to heads of state councils, state executive, judicial, and legislative branches and criminal justice administrators; monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance; and coordinate training and education regarding

regulations of interstate movement of offenders for officials involved in such activity. The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and bylaws and rules promulgated hereunder. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and are therefore public business.

ARTICLE II DEFINITIONS

As used in this compact, unless the context clearly requires a different construction:

(1) "Adult" means both individuals legally classified as adults and juveniles treated as adults by court order, statute or operation of law.

(2) "Bylaws" means those bylaws established by the interstate commission for its governance, or for directing or controlling the interstate commission's actions or conduct.

(3) "Compact administrator" means the individual in each compacting state appointed pursuant to the terms of this compact who is responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact.

(4) "Compacting state" means any state which has enacted the enabling legislation for this compact.

(5) "Commissioner" means the voting representative of each compacting state appointed pursuant to article III of this compact.

(6) "Interstate commission" means the interstate commission for adult offender supervision established by this compact.

(7) "Member" means the commissioner of a compacting state or designee, who shall be a person officially connected with the commissioner.

(8) "Noncompacting state" means any state which has not enacted the enabling legislation for this compact.

(9) "Offender" means an adult placed under, or subject to, supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.

(10) "Person" means any individual, corporation, business enterprise, or other legal entity, either public or private.

(11) "Rules" means acts of the interstate commission, duly promulgated pursuant to article VIII of this compact, substantially affecting interested parties in addition to the interstate commission, which shall have the force and effect of law in the compacting states.

(12) "State" means a state of the United States, the District of Columbia and any other territorial possessions of the United States.

(13) "State council" means the resident members of the state council for interstate adult offender supervision created by each state under article IV of this compact.

ARTICLE III THE COMPACT COMMISSION

(1) The compacting states hereby create the "Interstate Commission for Adult Offender Supervision." The interstate commission shall be a body corporate and joint agency of the compacting states. The interstate commission shall have all the responsibilities, powers and duties set forth herein, including the power to sue and be sued, and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact.

(2) The interstate commission shall consist of commissioners selected and appointed by resident members of a state council for interstate adult offender supervision for each state.

(3) In addition to the commissioners who are the voting representatives of the compacting states, the interstate commission shall include individuals who are not commissioners but who are members of interested organizations. Such noncommissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All noncommissioner members of the interstate commission shall be ex officio (nonvoting) members. The interstate commission may provide in its bylaws for such additional, ex officio, nonvoting members as it deems necessary.

(4) Each compacting state represented at any meeting of the interstate commission is entitled to one (1) vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission.

(5) The interstate commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of twenty-seven (27) or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

(6) The interstate commission shall establish an executive committee which shall include commission officers, members and others as shall be determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and/or amendment to the compact. The executive committee oversees the day-to-day activities managed by the executive director and interstate commission staff; administers enforcement and compliance with the provisions of the compact, its bylaws and as directed by the interstate commission; and performs other duties as directed by the commission or set forth in the bylaws.

ARTICLE IV THE STATE COUNCIL

(1) Each member state shall create a state council for interstate adult offender supervision which shall be responsible for the appointment of the commissioner who shall serve on the interstate commission from that state. Each state council shall appoint the compact administrator from that state as its commissioner to serve on the interstate commission in such capacity under or pursuant to applicable law of the member state. While each member state may determine the membership of its own state council, its membership must include at least one (1) representative from the legislative, judicial, and executive branches of government, victims groups and (the) compact administrator(s). Each compacting state retains the right to determine the qualifications of the compact administrator who shall be appointed by the state council or by the governor in consultation with the legislature and the judiciary.

(2) In addition to appointment of its commissioner to the interstate commission, each state council shall exercise oversight and advocacy concerning its participation in interstate commission activities and other duties as may be determined by each member state including, but not limited to, development of policy concerning operations and procedures of the compact within that state.

ARTICLE V POWERS AND DUTIES OF THE INTERSTATE COMMISSION

The interstate commission shall have the following powers:

(1) To adopt a seal and suitable bylaws governing the management and operation of the interstate commission;

(2) To promulgate rules which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact;

(3) To oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any bylaws adopted and rules promulgated by the commission;

(4) To enforce compliance with compact provisions, interstate commission rules, and bylaws, using all necessary and proper means including, but not limited to, the use of judicial process;

(5) To establish and maintain offices;

(6) To purchase and maintain insurance and bonds;

(7) To borrow, accept or contract for services of personnel including, but not limited to, members and their staffs;

(8) To establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions including, but not limited to, an executive committee as required by article III which shall have the power to act on behalf of the interstate commission in carrying out its powers and duties hereunder;

(9) To elect or appoint such officers, attorneys, employees, agents, or consultants, and to fix their compensation, define their duties and deter-

mine their qualifications; and to establish the interstate commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation and qualifications of personnel;

(10) To accept any and all donations and grants of money, equipment, supplies, materials and services, and to receive, utilize and dispose of same;

(11) To lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal or mixed;

(12) To sell, convey, mortgage, pledge, lease, exchange, abandon or otherwise dispose of any property, real, personal or mixed;

(13) To establish a budget and make expenditures and levy dues as provided in article X of this compact;

(14) To sue and be sued;

(15) To provide for dispute resolution among compacting states;

(16) To perform such functions as may be necessary or appropriate to achieve the purposes of this compact;

(17) To report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. Such reports shall also include any recommendations that may have been adopted by the interstate commission;

(18) To coordinate education, training and public awareness regarding the interstate movement of offenders for officials involved in such activity;

(19) To establish uniform standards for the reporting, collecting and exchanging of data.

ARTICLE VI ORGANIZATION AND OPERATION OF THE INTERSTATE COMMISSION

(1) The interstate commission shall, by a majority of the members, within twelve (12) months of the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including, but not limited to:

(a) Establishing the fiscal year of the interstate commission;

(b) Establishing an executive committee and such other committees as may be necessary;

(c) Providing reasonable standards and procedures:

(i) For the establishment of committees; and

(ii) Governing any general or specific delegation of any authority or function of the interstate commission;

(d) Providing reasonable procedures for calling and conducting meetings of the interstate commission, and ensuring reasonable notice of each such meeting;

(e) Establishing the titles and responsibilities of the officers of the interstate commission;

(f) Providing reasonable standards and procedures for the establishment of the personnel policies and programs of the interstate commission. Notwithstanding any civil service or other similar laws of any compacting

state, the bylaws shall exclusively govern the personnel policies and programs of the interstate commission;

(g) Providing a mechanism for winding up the operations of the interstate commission and the equitable return of any surplus funds that may exist upon the termination of the compact after the payment and/or reserving of all of its debts and obligations;

(h) Providing transition rules for "start up" administration of the compact;

(i) Establishing standards and procedures for compliance and technical assistance in carrying out the compact.

(2) The interstate commission shall, by a majority of the members, elect from among its members a chairperson and a vice chairperson, each of whom shall have such authorities and duties as may be specified in the bylaws. The chairperson or, in the chairperson's absence or disability, the vice chairperson, shall preside at all meetings of the interstate commission. The officers so elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission.

(3) The interstate commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, and hire and supervise such other staff as may be authorized by the interstate commission, but shall not be a member.

(4) The interstate commission shall maintain its corporate books and records in accordance with the bylaws.

(5) The members, officers, executive director and employees of the interstate commission shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities; provided that nothing in this paragraph shall be construed to protect any such person from suit and/or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of any such person.

(6) The interstate commission shall defend the commissioner of a compacting state, or the commissioner's representatives or employees, or the interstate commission's representatives or employees, in any civil action seeking to impose liability arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person.

(7) The interstate commission shall indemnify and hold the commissioner of a compacting state, the appointed designee or employees, or the interstate

commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

ARTICLE VII ACTIVITIES OF THE INTERSTATE COMMISSION

(1) The interstate commission shall meet and take such actions as are consistent with the provisions of this compact.

(2) Except as otherwise provided in this compact and unless a greater percentage is required by the bylaws, in order to constitute an act of the interstate commission, such act shall have been taken at a meeting of the interstate commission and shall have received an affirmative vote of a majority of the members present.

(3) Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person on behalf of the state and shall not delegate a vote to another member state. However, a state council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the member state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.

(4) The interstate commission shall meet at least once during each calendar year. The chairperson of the interstate commission may call additional meetings at any time and, upon the request of a majority of the members, shall call additional meetings.

(5) The interstate commission shall establish conditions and procedures under which the interstate commission shall make its information and official records available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such rules, the interstate commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to nondisclosure and confidentiality provisions.

(6) Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission shall promulgate rules consistent

with the principles contained in the government in sunshine act, 5 U.S.C. section 552(b), as may be amended. The interstate commission and any of its committees may close a meeting to the public where it determines by two-thirds ($\frac{2}{3}$) vote that an open meeting would be likely to:

- (a) Relate solely to the interstate commission's internal personnel practices and procedures;
- (b) Disclose matters specifically exempted from disclosure by statute;
- (c) Disclose trade secrets or commercial or financial information which is privileged or confidential;
- (d) Involve accusing any person of a crime, or formally censuring any person;
- (e) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;
- (f) Disclose investigatory records compiled for law enforcement purposes;
- (g) Disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the interstate commission with respect to a regulated entity for the purpose of regulation or supervision of such entity;
- (h) Disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity;
- (i) Specifically relate to the interstate commission's issuance of a subpoena, or its participation in a civil action or proceeding.

For every meeting closed pursuant to this provision, the interstate commission's chief legal officer shall publicly certify that, in the officer's opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision.

(7) The interstate commission shall keep minutes which shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflected in the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(8) The interstate commission shall collect standardized data concerning the interstate movement of offenders as directed through its bylaws and rules which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

ARTICLE VIII

RULEMAKING FUNCTIONS OF THE INTERSTATE COMMISSION

(1) The interstate commission shall promulgate rules in order to effectively and efficiently achieve the purposes of the compact including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states.

(2) Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal

administrative procedure act, 5 U.S.C.S. section 551 et seq., and the federal advisory committee act, 5 U.S.C.S. app. 2, section 1 et seq., as may be amended (hereinafter "APA").

(3) All rules and amendments shall become binding as of the date specified in each rule or amendment.

(4) If a majority of the legislatures of the compacting states rejects a rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such rule shall have no further force and effect in any compacting state.

(5) When promulgating a rule, the interstate commission shall:

- (a) Publish the proposed rule stating with particularity the text of the rule which is proposed and the reason for the proposed rule;
- (b) Allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;
- (c) Provide an opportunity for an informal hearing; and
- (d) Promulgate a final rule and its effective date, if appropriate, based on the rulemaking record.

(6) Not later than sixty (60) days after a rule is promulgated, any interested person may file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission's principal office is located for judicial review of such rule. If the court finds that the interstate commission's action is not supported by substantial evidence, as defined in the APA, in the rulemaking record, the court shall hold the rule unlawful and set it aside.

(7) Subjects to be addressed within twelve (12) months after the first meeting must at a minimum include:

- (a) Notice to victims and opportunity to be heard;
- (b) Offender registration and compliance;
- (c) Violations/returns;
- (d) Transfer procedures and forms;
- (e) Eligibility for transfer;
- (f) Collection of restitution and fees from offenders;
- (g) Data collection and reporting;
- (h) The level of supervision to be provided by the receiving state;
- (i) Transition rules governing the operation of the compact and the interstate commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact.
- (j) Mediation, arbitration and dispute resolution.

(8) The existing rules governing the operation of the previous compact superseded by this act shall be null and void twelve (12) months after the first meeting of the interstate commission created hereunder.

(9) Upon determination by the interstate commission that an emergency exists, it may promulgate an emergency rule which shall become effective immediately upon adoption; provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, but in no event later than ninety (90) days after the effective date of the rule.

ARTICLE IX
OVERSIGHT, ENFORCEMENT AND DISPUTE RESOLUTION BY THE
INTERSTATE COMMISSION

(1) The interstate commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in noncompacting states which may significantly affect compacting states.

(2) The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact which may affect the powers, responsibilities or actions of the interstate commission, the interstate commission shall be entitled to receive all service of process in any such proceeding, and shall have standing to intervene in the proceeding for all purposes.

(3) The compacting states shall report to the interstate commission on issues or activities of concern to them, and cooperate with and support the interstate commission in the discharge of its duties and responsibilities.

(4) The interstate commission shall attempt to resolve any disputes or other issues which are subject to the compact and which may arise among compacting states and noncompacting states.

(5) The interstate commission shall enact a bylaw or promulgate a rule providing for both mediation and binding dispute resolution for disputes among the compacting states.

(6) The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in article XII, of this compact.

ARTICLE X
FINANCE

(1) The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

(2) The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff which must be in a total amount sufficient to cover the interstate commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of the state and the volume of interstate movement of offenders in each compacting state and shall promulgate a rule binding upon all compacting states which governs said assessment.

(3) The interstate commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same, nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

(4) The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

ARTICLE XI

COMPACTING STATES, EFFECTIVE DATE AND AMENDMENT

(1) Any state, as defined in article II of this compact, is eligible to become a compacting state.

(2) The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five (35) of the states. The initial effective date shall be the later of July 1, 2001, or upon enactment into law by the thirty-fifth jurisdiction. Thereafter it shall become effective and binding, as to any other compacting state, upon enactment of the compact into law by that state. The governors of nonmember states or their designees will be invited to participate in interstate commission activities on a nonvoting basis prior to adoption of the compact by all states and territories of the United States.

(3) Amendments to the compact may be proposed by the interstate commission for enactment by the compacting states. No amendment shall become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

ARTICLE XII

WITHDRAWAL, DEFAULT, TERMINATION AND JUDICIAL ENFORCEMENT

(1) Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided, that a compacting state may withdraw from the compact ("withdrawing state") by enacting a statute specifically repealing the statute which enacted the compact into law. The effective date of withdrawal is the effective date of the repeal.

(2) The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the withdrawing state's intent to withdraw within sixty (60) days of its receipt thereof.

(3) The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations the performance of which extend beyond the effective date of withdrawal.

(4) Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state's reenactment of the compact or upon such later date as determined by the interstate commission.

(5) If the interstate commission determines that any compacting state has at any time defaulted ("defaulting state") in the performance of any of its obligations or responsibilities under this compact, the bylaws or any duly promulgated rules, the interstate commission may impose any or all of the following penalties:

- (a) Fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the interstate commission;
- (b) Remedial training and technical assistance as directed by the interstate commission;
- (c) Suspension and termination of membership in the compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted. Immediate notice of suspension shall be given by the interstate commission to the governor, the chief justice or chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature, and the state council.

(6) The grounds for default include, but are not limited to, failure of a compacting state to perform such obligations or responsibilities imposed upon it by this compact, interstate commission bylaws, or duly promulgated rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission on the defaulting state pending a cure of the default. The interstate commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the interstate commission, in addition to any other penalties imposed herein, the defaulting state may be terminated from the compact upon an affirmative vote of a majority of the compacting states and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of suspension.

(7) Within sixty (60) days of the effective date of termination of a defaulting state, the interstate commission shall notify the governor, the chief justice or chief judicial officer and the majority and minority leaders of the defaulting state's legislature and the state council of such termination.

(8) The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination including any obligations the performance of which extends beyond the effective date of termination.

(9) The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon between the interstate commission and the defaulting state.

(10) Reinstatement following termination of any compacting state requires both a reenactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

(11) The interstate commission may, by majority vote of the members, initiate legal action in the United States district court for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices to enforce compliance with the provisions of the compact, its duly promulgated rules and bylaws,

against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of such litigation including reasonable attorney's fees.

(12) The compact dissolves effective upon the date of the withdrawal or default of the compacting state which reduces membership in the compact to one (1) compacting state. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be wound up and any surplus funds shall be distributed in accordance with the bylaws.

ARTICLE XIII SEVERABILITY AND CONSTRUCTION

(1) The provisions of this compact shall be severable, and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall be enforceable.

(2) The provisions of this compact shall be liberally constructed to effectuate its purposes.

ARTICLE XIV BINDING EFFECT OF COMPACT AND OTHER LAWS

(1) Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact.

(2) All compacting states' laws conflicting with this compact are superseded to the extent of the conflict.

(3) All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states.

(4) All agreements between the interstate commission and the compacting states are binding in accordance with their terms.

(5) Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding such meaning or interpretation.

(6) In the event any provision of this compact exceeds the constitutional limits imposed on the legislature of any compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the interstate commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective. [I.C., § 20-301, as added by 2000, ch. 413, § 2, p. 1307.]

Compiler's notes. Former § 20-301, which comprised 1941, ch. 148, § 1, p. 300; am. 1951, ch. 101, § 1, p. 226, was repealed by S.L. 2000, ch. 413, § 1, effective upon the enactment of the Interstate Compact for Adult Offender Supervision into law by thirty-five states or July 1, 2001, whichever is

later. On June 19, 2002, Pennsylvania became the 35th state to sign the compact, making the compact effective that date in Idaho.

Section 4 of S.L. 2000, ch. 413, provides: "This act shall become effective upon the enactment of the Interstate Compact for

Adult Offender Supervision into law by thirty-five states or July 1, 2001, whichever is later". On June 19, 2002, Pennsylvania be-

came the 35th state to sign the compact, making the compact effective that date in Idaho.

20-302. Short title. — This act may be cited as the “Interstate Compact for Adult Offender Supervision.” [I.C., § 20-302, as added by 2000, ch. 413, § 3, p. 1307.]

Compiler’s notes. Former § 20-301, which comprised 1941, ch. 148, § 1, p. 300; am. 1951, ch. 101, § 1, p. 226, was repealed by S.L. 2000, ch. 413, § 1, effective upon the enactment of the Interstate Compact for Adult Offender Supervision into law by thirty-five states or July 1, 2001, whichever is later. On June 19, 2002, Pennsylvania became the 35th state to sign the compact, making the compact effective that date in Idaho.

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CHAPTER 4

CORRECTIONAL INDUSTRIES ACT

SECTION.

- 20-401. Short title.
- 20-402. Correctional institution products.
- 20-403. Governing body created — Members.
- 20-404. Authority and duties vested in board.
- 20-405. Governing body — Meetings — Quorum — Vote to transact business.
- 20-406. Compensation and expenses.
- 20-407. Jurisdiction of board.
- 20-408. Duties of board.
- 20-409. Payment of expenses of board.
- 20-410. Work of inmates assigned to do conservation work.
- 20-411. Insurance of products, materials and equipment — Payment of cost of insurance.
- 20-412. Compensation — Amount — Credit-

SECTION.

- ing account of prisoner — Civil rights — Prisoners not employees.
- 20-413. Goods and services for government, nonprofit organizations, and public use — Contracts.
- 20-414. Disposition of products.
- 20-415. Correctional industries betterment account — Transfer of funds.
- 20-415A. [Repealed.]
- 20-416. Deposit and disposition of funds and receipts.
- 20-417. Marking products.
- 20-418. Determination of prices.
- 20-419. Account as continuing appropriation — Nonreversion.

20-401. Short title. — This act shall be known and cited as the “Correctional Industries Act.” [I.C., § 20-401, as added by 1974, ch. 48, § 2, p. 1096.]

Compiler’s notes. A former chapter 4, which comprised S.L. 1933, ch. 216, §§ 1-10; 1941, ch. 120, § 1; 1943, ch. 67, §§ 1-3; 1951, ch. 84, § 1; 1972, ch. 236, § 1, was repealed by S.L. 1974, ch. 48, § 1 and the present chapter substituted therefor.
The words “this act” refer to S.L. 1974, ch. 48, § 2 compiled as §§ 20-401 — 20-419.

Collateral References. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 1 et seq.
72 C.J.S., Prisons and Rights of Prisoners, § 1 et seq.

20-402. Correctional institution products. — The term “correctional institution products” as used in this act, means all services and labor provided, goods, wares and merchandise manufactured or produced wholly

or in part, except "hobby-craft" articles, by inmates employed by Idaho state correctional industries. [I.C., § 20-402, as added by 1974, ch. 48, § 2, p. 1096.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

For words "this act" see compiler's note, § 20-401.

20-403. Governing body created — Members. — There is hereby created the governing body which shall consist of the members of the board of correction. [I.C., § 20-403, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 1, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

20-404. Authority and duties vested in board. — The authority and duties herein are vested in the board of correction. [I.C., § 20-404, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 2, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

20-405. Governing body — Meetings — Quorum — Vote to transact business. — The board of correction shall be the governing body of correctional industries. The board shall meet at such times and places as may be necessary for the conduct of its business. Meetings may be held at the call of the chairman or a majority of the board, but in no event shall they meet less than quarterly. A majority of the board shall constitute a quorum for the transaction of business and no order of the board shall be valid unless concurred in by at least two (2) of its members. [I.C., § 20-405, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 3, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

20-406. Compensation and expenses. — All members shall also receive their actual and necessary expenses of travel and accommodations incurred in attending meetings of the board[,], attending other functions related to correctional industries, and in making investigations, either as a board or individually as members of the board at the request of the chairman. [I.C., § 20-406, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 4, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

The bracketed comma preceding the word "attending" was inserted by the compiler.

20-407. Jurisdiction of board. — The jurisdiction of the board of correction may extend to all productive enterprises in the prison facilities. As used in this chapter, "an enterprise" means an operation, including services and labor, or group of closely related operations within the institution.

At each regular meeting of the board the chairman shall report on the condition of each enterprise. [I.C., § 20-407, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 5, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

20-408. Duties of board. — The board of correction shall:

(a) Recommend productive enterprises in the penal institutions under the jurisdiction of the department of correction, in such volume and of such kinds as to eliminate unnecessary idleness among the inmates and to provide diversified work activities which will serve as a means of vocational education and rehabilitation, as well as financial support;

(b) Determine the advisability and suitability of establishing, expanding, diminishing, or discontinuing any enterprise;

(c) Hold hearings and make rules for conducting such hearings. The board may, in its discretion, hold public hearings on any subject within its jurisdiction;

(d) Conduct programs of research, education and publicity for correctional industries products;

(e) Secure new markets for correctional industries products;

(f) Enter into such contracts and agreements as may be necessary or advisable pursuant to the provisions of this act;

(g) Appoint and employ all necessary officers, agents and other personnel, including any experts in any correctional industries enterprise pursuit, prescribe their duties and fix their compensation;

(h) Cooperate with any local, state or national organization or agency and to enter into contracts and agreements with such agencies for carrying on and promoting the purposes of this act;

(i) Adopt, rescind, modify and amend all necessary and proper orders, rules and regulations for the exercise of its powers and the performance of its duties herein;

(j) Keep or cause to be kept in accordance with accepted standards of good accounting practice, accurate records of all collections, receipts, deposits, withdrawals, disbursements, paid-outs, moneys, and other financial transactions made and done pursuant to this act. Such records, books and accounts shall be audited subject to lawful, sound procedures and methods of accounting at least annually and a copy of such audit shall be delivered within thirty (30) days after completion thereof to the board of correction. The books, records and accounts shall be open to inspection and audit by the legislative council and the public at all times. [I.C., § 20-408, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 6, p. 220; am. 1993, ch. 327, § 5, p. 1186.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

For words "this act" see compiler's note, § 20-401.

Sections 4 and 6 of S.L. 1993, ch. 327 are compiled as §§ 9-340 (repealed) and 22-1209, respectively.

20-409. Payment of expenses of board. — The expenses of the board shall be paid from the correctional industries betterment account. [I.C., § 20-409, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 7, p. 220; 1983, ch. 223, § 2, p. 618.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.
Sections 1 and 3 of S.L. 1983, ch. 223 are

compiled as §§ 20-209D and 20-411, respectively.

20-410. Work of inmates assigned to do conservation work. — Inmates may be assigned to do conservation work on a permanent or temporary basis. The board or its designated agent may, at such times as it deems proper and on such terms as it deems wise, enter into contracts or cooperative agreements with any public agency, state or federal, for the performance of conservation projects which are appropriate and under conditions consistent with policies established by the board.

Inmates may be assigned to perform public conservation projects including, but not limited to, forest fire prevention and control, forest and watershed management, recreational area development, fish and game management, soil conservation and forest watershed revegetation. [I.C., § 20-410, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 8, p. 220.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

20-411. Insurance of products, materials and equipment — Payment of cost of insurance. — The board may, in its discretion, insure any or all products produced at any institution under the jurisdiction of the board of correction, whether the products are finished or unfinished, the materials from which such products are made or to be made, and the equipment necessary for the production thereof, against any and all risks of loss, wherever such products, materials or equipment are located, while in the possession of the institution and while in transit thereto or therefrom, or in storage, in such amounts as the board deems proper. The cost of such insurance shall be paid from the correctional industries betterment account. [I.C., § 20-411, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 9, p. 220; 1983, ch. 223, § 3, p. 618.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

Section 2 of S.L. 1983, ch. 223 is compiled as § 20-409.

20-412. Compensation — Amount — Crediting account of prisoner — Civil rights — Prisoners not employees. — Each prisoner, who is engaged in productive work in the institution under the jurisdiction of the board of correction as a part of the correctional industries work program, may receive for his work such compensation as the board shall determine, to be paid out of any funds available in the correctional industries betterment account. Such compensation, if any, shall be in accordance with a graduated schedule based on quantity and quality of work performed and skill required

for its performance. Compensation shall be credited to the account of the prisoner, and paid from the correctional industries betterment account.

Nothing in this section or in this act is intended to restore, in whole or in part, the civil rights of any inmate. No inmate compensated under this act shall be considered an employee of the state or the board of correction, nor shall any inmate come within any of the provisions of the workmen's compensation laws, or be entitled to any benefits thereunder whether on behalf of himself or any other person. [I.C., § 20-412, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 10, p. 220; 1983, ch. 223, § 4, p. 618.]

Compiler's notes. For repeal of former section see compiler's note, § 20-401.

For words "this act" see compiler's note, § 20-401.

The section heading of this section as enacted also contained the word "Forfeitures" following "Crediting account of prisoner." The subject of forfeiture, however, does not appear in the section.

Section 5 of S.L. 1983, ch. 223 is compiled as § 20-415.

Application.

An inmate who is performing work at a state correctional facility is not working under any contract of hire, either express or implied by law, and thus, is not an employee of the state for worker's compensation purposes. *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999), (decided prior to 2004 amendment).

20-413. Goods and services for government, nonprofit organizations, and public use — Contracts. — The board is hereby authorized and empowered to cause the inmates in the state prison to be employed in the rendering of such services and in the production and manufacture of such articles, materials, and supplies as are now or may hereafter be needed by any public institution or agency of the state or any political subdivision thereof, including but not limited to counties, districts, municipalities, schools, nonprofit organizations, and other public use. The board may cause the inmates to be employed in rendering such services or producing and manufacturing such articles, materials, and supplies as are now or may hereafter be needed for use by the federal government for any department, agency or corporation thereof. The board may contract to sell products manufactured by correctional industries to retail or wholesale establishments within the state. The board or its designated agent may enter into contracts for the purposes of this article.

The board may contract with other state and federal penal institutions and with out-of-state governmental entities for the production, manufacture, exchange, sale, or purchase of goods, wares and merchandise manufactured or produced wholly or in part by inmates of the Idaho state penitentiary or of any state or federal penal institution. [I.C., § 20-413, as added by 1974, ch. 48, § 2, p. 1096; am. 1978, ch. 147, § 1, p. 329; am. 1980, ch. 101, § 11, p. 220; am. 1981, ch. 155, § 1, p. 266.]

Opinions of Attorney General. Correctional industries may sell its products to retail or wholesale establishments within the state only where it is intended that the products will eventually be offered for resale to the general public; thus, correctional industries

products may not be sold to retail or wholesale establishments that: (1) are not in the business of selling such products, or (2) do not intend to sell the correctional industries products. OAG 01-1.

20-414. Disposition of products. — All articles, materials, and supplies, produced or manufactured under the provisions of this act, shall be solely and exclusively for public or nonprofit organization use and no article, material, or supplies, produced or manufactured under the provisions of this chapter shall ever be sold, supplied, furnished, and exchanged, or given away for any private use or profit, except as allowed by the preceding section. However, by-products and surpluses of agricultural and animal husbandry enterprises may be sold to private persons, at private sale, under rules prescribed by the board of correction. [I.C., § 20-414, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 12, p. 220.]

Compiler's notes. For words "this act" see compiler's note, § 20-401.

Opinions of Attorney General. Correctional industries may sell its products to retail or wholesale establishments within the state only where it is intended that the products will eventually be offered for resale to the

general public; thus, correctional industries products may not be sold to retail or wholesale establishments that: (1) are not in the business of selling such products, or (2) do not intend to sell the correctional industries products. OAG 01-1.

20-415. Correctional industries betterment account — Transfer of funds. — Funds held by the board of correction on June 30, 1983, in depositories, shall be transferred therefrom by the board of correction, and deposited on July 1, 1983, with the treasurer of the state of Idaho in the correctional industries betterment account which is hereby created in the agency asset fund. All state departments, agencies and offices affected by such transfer are authorized and directed to enter such transfer on their books, records and accounts.

Pending use, surplus moneys in the account shall be invested by the state treasurer in the same manner as provided under section 67-1210, Idaho Code, with respect to other surplus or idle moneys in the state treasury. Interest earned on the investments shall be returned to the account. [I.C., § 20-415, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 13, p. 220; 1983, ch. 223, § 5, p. 618.]

Compiler's notes. For words "this act" see compiler's note, § 20-401.

Section 4 of S.L. 1983, ch. 223 is compiled as § 20-412.

Opinions of Attorney General. The transfer of the prison industries betterment

fund from the aegis of the state auditor to the separate and exclusive control of the Correctional Industries Commission is a constitutionally impermissible violation of Const., Art. 4, § 1. OAG 83-4.

20-415A. Transfer of equipment. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 20-415A, as added by 1979, ch. 153, § 1, p. 468; am. 1980, ch. 101, § 14, p. 220, was repealed by S.L. 1983, ch. 223, § 6.

20-416. Deposit and disposition of funds and receipts. — (1) All funds transferred under the provisions of this act and moneys received for sale of goods or services under the provisions of this chapter shall be deposited in the correctional industries betterment account. The board may adopt, rescind, modify and amend regulations not inconsistent with this act and the laws of the state of Idaho related to the deposit or disposition of

funds in the correctional industries betterment account. All moneys received under the provisions of this chapter shall be deposited in the account and made available for defraying expenses or repaying indebtedness of the board in carrying out the provisions of this chapter.

(2) All salaries, costs and expenses incurred by the board in performing its duties and exercise of power under this chapter shall be paid out of the correctional industries betterment account.

(3) Subject to the provisions of this act pertaining to annual audit and established accounting procedures, the correctional industries betterment account is exempted from powers and duties of the state purchasing agent, as enumerated in chapter 16, title 67, Idaho Code.

(4) Surplus moneys in the correctional industries betterment account may be expended by the board for the use and benefit of vocational training and educational programs. [I.C., § 20-416, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 15, p. 220; 1983, ch. 223, § 7, p. 618.]

Compiler's notes. For words "this act" see compiler's note, § 20-401.

Chapter 16, title 67, Idaho Code, referred to in subsection (3) of this section, was repealed. For present law, see §§ 67-5714 — 67-5744.

Section 16 of S.L. 1980, ch. 101 is compiled as § 20-418.

Section 8 of S.L. 1983, ch. 223 is compiled as § 20-419.

20-417. Marking products. — Each and every article manufactured under the provisions of this act shall have plainly marked or stamped thereon the words "Idaho Correctional Industries." [I.C., § 20-417, as added by 1974, ch. 48, § 2, p. 1096.]

Compiler's notes. For words "this act" see compiler's note, § 20-401.

20-418. Determination of prices. — The board shall from time to time determine the price at which such services, articles, materials, and supplies shall be sold. [I.C., § 20-418, as added by 1974, ch. 48, § 2, p. 1096; am. 1980, ch. 101, § 16, p. 220.]

Compiler's notes. Section 15 of S.L. 1980, ch. 101 is compiled as § 20-416.

20-419. Account as continuing appropriation — Nonreversion. — All moneys transferred to or hereafter placed in the correctional industries betterment account are hereby perpetually appropriated for the use and purposes specified in this chapter. The correctional industries betterment account or any surplus funds in said account shall not revert to the state general account. [I.C., § 20-419, as added by 1974, ch. 48, § 2, p. 1096; 1983, ch. 223, § 8, p. 618.]

Compiler's notes. For words "this act" see compiler's note, § 20-401.

Section 7 of S.L. 1983, ch. 223 is compiled as § 20-416.

CHAPTER 5

JUVENILE CORRECTIONS ACT

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20-501. Legislative intent. — It is the policy of the state of Idaho that the juvenile corrections system will be based on the following principles: accountability; community protection; and competency development. Where a juvenile has been found to be within the purview of the juvenile corrections act, the court shall impose a sentence that will protect the

community, hold the juvenile accountable for his actions, and assist the juvenile in developing skills to become a contributing member of a diverse community. It is the further policy of the state of Idaho that the parents or other legal guardians of the juvenile offender participate in the accomplishment of these goals through participation in counseling and treatment designed to develop positive parenting skills and an understanding of the family's role in the juvenile's behavior. It is the further intent of the legislature that the parents or legal guardians of the juvenile offender be held accountable, where appropriate, through monetary reimbursement for supervision and confinement of the juvenile offender, and restitution to victims of the juvenile's delinquent acts. In enacting this legislation, the legislature finds that the juvenile corrections system should encompass the following aspects: day treatment, community programs, observation and assessment programs, probation services, secure facilities, after-care and assistance to counties for juveniles not committed to the custody of the department of juvenile corrections.

The following is a brief description of what the legislature intends to become the components of Idaho's juvenile corrections system:

Probation. Probation officers would have twenty-four (24) hour on call responsibility for juveniles and would monitor their activities on a continual basis. Probation officers would be responsible for assisting juveniles and their families in accessing counseling or treatment resources, close supervision of juveniles' activities, supervision of restitution and coordination of other services provided to juveniles. Juvenile offenders ordered into the custody of the department of juvenile corrections would be monitored by a county probation officer.

Day treatment. Day treatment programs would be time limited nonresidential treatment and educational programs. Included in these programs would be trackers who would provide intensive supervision of juveniles through daily contact and by counseling juveniles regarding employment, education, courts, family and life skills. Nonresidential alcohol and drug programs would provide outpatient assessment and counseling for juveniles with substance abuse problems.

Community programs. It is intended that community programs would exist throughout the state to provide twenty-four (24) hour residential supervision and treatment options to juveniles in close proximity to their families and their community. It is intended that these programs would strengthen the juvenile's relationship with family, engender a commitment to school and employment, promote the development of competency and life skills and help juveniles generalize appropriate behavior into their environment.

Observation and assessment. Regional observation and assessment centers would be provided, either directly or on a contract basis, to conduct observation and assessment of the juvenile in a short-term residential experience. It is intended that these programs would maintain standardized home and daily routines with intensive daily programming.

Secure facilities. Secure facilities would provide secure confinement, discipline, education and treatment of the most seriously delinquent juve-

niles. Programs at the secure facilities would be designed to help juveniles recognize accountability for delinquent behavior by confronting and eliminating delinquent norms, criminal thinking and antisocial behavior and making restitution to victims through community service or other restitution programs.

It is the further intent of the legislature that the primary purpose of this act is to provide a continuum of programs which emphasize the juvenile offender's accountability for his actions while assisting him in the development of skills necessary to function effectively and positively in the community in a manner consistent with public safety. These services and programs will individualize treatment and control of the juvenile offender for the benefit of the juvenile and the protection of society. It is legislative intent that the department of juvenile corrections be operated within the framework of the following principles to accomplish this mission:

(1) Provide humane, disciplined confinement to a juvenile who presents a danger to the community.

(2) Strengthen opportunities for the juvenile's development of competency and life skills by expanding the juvenile's access to applicable programs and community resources.

(3) Hold juveniles accountable for their delinquent behavior through such means as victim restitution, community service programs and the sharing of correctional costs.

(4) Invoke the participation of the juvenile offender's parent or legal guardian in assisting the juvenile to recognize and accept responsibility for his delinquent or other antisocial behavior and hold the parent or legal guardian accountable, where appropriate, through the payment of detention costs and restitution to victims and through attendance at programs for the development of positive parenting skills designed to promote a functional relationship between the juvenile and his family.

(5) Develop efficient and effective juvenile correctional programs within the framework of professional correctional standards, legislative intent and available resources.

(6) Provide for a diversity of innovative and effective programs through research on delinquent behavior and the continuous evaluation of correctional programs.

(7) Assist counties in developing meaningful programs for juveniles who have come into the juvenile corrections system but who have not been committed to the custody of the department of juvenile corrections.

(8) Provide programs to increase public awareness of the mission of the juvenile corrections system and encourage public participation in developing an effective juvenile corrections system designed to aid in reducing juvenile crime in this state.

(9) Develop and maintain a statewide juvenile offender information system. [1963, ch. 319, § 1, p. 876; am. 1984, ch. 81, § 2, p. 148; am. 1989, ch. 155, § 1, p. 371; am. and redesign. 1995, ch. 44, § 2, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1801 and was amended and redesignated as this section by § 2 of S.L. 1995, ch. 44, effective October 1, 1995.

Former §§ 20-501 — 20-505 were repealed as follows:

§ 20-501, which comprised I.C., § 20-501, as added by 1980, ch. 216, § 2, p. 488; am. 1990, ch. 96, § 1, p. 201 was repealed by S.L. 1994, ch. 37, § 1, effective July 1, 1994.

§ 20-502, which comprised I.C., § 20-502, as added by 1980, ch. 216, § 3, p. 488; am. 1990, ch. 97, § 1, p. 202 was repealed by S.L. 1994, ch. 37, § 1, effective July 1, 1994.

§ 20-503, which comprised 1905, p. 33, § 3; reen. R.C. & C.L., § 8517; C.S., § 9412; I.C.A., § 20-503; am. 1974, ch. 6, § 9, p. 28, was repealed by S.L. 1984, ch. 93, § 1.

§ 20-504, which comprised 1905, p. 33, § 4; reen. R.C. & C.L., § 8518; C.S., § 9413; I.C.A., § 20-504; am. 1974, ch. 6, § 10, p. 28 was repealed by S.L. 1994, ch. 37, § 1, effective July 1, 1994.

§ 20-505, which comprised 1905, p. 33, § 5; reen. R.C. & C.L., § 8519; C.S., § 9414; I.C.A., § 20-505 was repealed by S.L. 1994, ch. 37, § 1, effective July 1, 1994.

Another former § 20-501, which comprised 1905, p. 33, § 1; am. R.C. & C.L., § 8515; C.S., § 9410; I.C.A., § 20-501, was repealed by S.L. 1980, ch. 216, § 1.

Another former § 20-502, which comprised 1905, p. 33, § 2; reen. R.C. & C.L., § 8516; C.S., § 9411; I.C.A., § 20-502; am. 1974, ch. 6, § 8, p. 28, was repealed by S.L. 1980, ch. 216, § 1.

Section 1 of S.L. 1984, ch. 81 contained repeals.

Section 1 of S.L. 1995, ch. 44 amended the chapter heading of former Chapter 18, Title 16 to become Chapter 5, Title 20 and read "Chapter 5, Juvenile Corrections Act".

Section 65 of S.L. 1995, ch. 44 provided that this section as amended and redesignated should be in full force and effect on October 1, 1995.

Cross ref. Idaho Juvenile Rules, Rules 1-29.

Sec. to sec. ref. This chapter is referred to in §§ 8-705, 9-340B, 16-2101, 18-216, 18-1502B, 18-1502C, 18-2505, 18-2506, 18-8001, 18-8005, 19-5306, 20-504, 20-524, 20-547, 32-1301, and 72-102.

Rule to sec. ref. This chapter is referred to in I.R.C.P., Rules 82(c)(1), the Idaho Juvenile Rules, and I.R.E., Rule 101.

Cited in: State v. Bronson, 94 Idaho 306, 486 P.2d 1019 (1971); State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972); State v. Lindquist, 99 Idaho 766, 589 P.2d 101 (1979); State v. Anderson, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985); State v. Doe (In re Doe), — Idaho —, 72 P.3d 547 (Ct. App. 2003).

ANALYSIS

Appealable order.
Legislative goal.
Scope.

Speedy trial.

Strict construction.

Appealable Order.

Where magistrate's order withholding judgment and placing youth on probation for a six months' period was based upon the finding that the youth had committed the criminal offense of statutory rape, the order withholding judgment was appealable, even though it was not a final disposition of the matter. In re Doe, 98 Idaho 40, 557 P.2d 634 (1976).

Legislative Goal.

The legislative scheme — providing that a petition for the initial determination of whether a child is being adequately educated will be filed pursuant to the Youth Rehabilitation Act (YRA) — is to ensure that a determination as to the adequacy of a child's education is made by a court of competent jurisdiction without the stigma of criminal proceedings attaching; even more obvious is society's objection, as expressed by the legislature in the enactment of the compulsory education statutes and the YRA, to have Idaho's children educated so that they may be productive citizens not disadvantaged by lack of education adequate to meet the demands of modern life. The goal is not to label children "juvenile delinquents" by bringing them before the courts, but to achieve society's objective by positive and orderly resolution of the parties' differences within an impartial legal framework. Bayes v. State, 117 Idaho 96, 785 P.2d 660 (Ct. App. 1989).

Scope.

Seventeen-year-old minor was brought within the purview of the Juvenile Corrections Act, Idaho Code § 20-501 et seq., for committing a battery. Since battery is not a status offense, the State was not required to prove her age in order to establish her guilt. State v. Doe (In re Doe), — Idaho —, 79 P.3d 165 (Ct. App. 2003).

Speedy Trial.

Defendant's statutory right to a speedy trial did not apply until jurisdiction under the juvenile corrections statute had been waived. State v. Hernandez, 133 Idaho 576, 990 P.2d 742 (Ct. App. 1999).

Strict Construction.

The automatic waiver provision of § 20-509, because of the legislative intent set forth in this section concerning the appropriate rehabilitation of the juvenile offender, is to be strictly construed. State v. Larios, 125 Idaho 727, 874 P.2d 538 (1994).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 1-127.

43 C.J.S., Infants, §§ 31-91, 198-214.

20-502. Definitions. — When used in this chapter, unless the context otherwise requires:

- (1) “Adult” means a person eighteen (18) years of age or older.
- (2) “Commit” means to transfer legal custody.
- (3) “Community-based program” means an in-home confinement program or a nonsecure or staff secure residential or nonresidential program operated to supervise and provide competency development to juvenile offenders in the least restrictive setting, consistent with public safety, operated by the state or under contract with the state or by the county.
- (4) “Court” means any district court within the state of Idaho, or magistrate’s division thereof.
- (5) “Department” means the state department of juvenile corrections.
- (6) “Detention” means the temporary placement of juveniles who require secure custody for their own or the community’s protection in physically restricting facilities.
- (7) “Detention center” means a facility established pursuant to sections 20-517 and 20-518, Idaho Code.
- (8) “Director” means the director of the department of juvenile corrections.
- (9) “Diversion” means the utilization of local community resources, churches, counseling for the juvenile and/or family, substance abuse counseling, informal probation, community service work, voluntary restitution, or any other available service or program as an alternative to the filing of a petition with the juvenile court.
- (10) “Judge” means a district judge or a magistrate.
- (11) “Juvenile” means a person less than eighteen (18) years of age or who was less than eighteen (18) years of age at the time of any act, omission or status bringing the person within the purview of this chapter.
- (12) “Juvenile corrections center” means any state-operated secure facility wherever located.
- (13) “Juvenile offender” means a person under the age of eighteen (18), committed by the court to the custody, care and jurisdiction of the department for confinement in a secure or community-based facility following adjudication for a delinquent act which would constitute a felony or misdemeanor if committed by an adult.
- (14) “Legal custody” means the relationship created by the court’s decree which imposes upon the custodian responsibilities of physical possession of the juvenile, the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care.
- (15) “Legal guardian” means a person appointed as guardian of a minor under the laws of Idaho. For the purposes of this chapter, legal guardian does not include and shall not be construed to include the owner, operator or the agent of an owner or operator of a detention center, observation and assessment center, secure facility, residential facility or other facility having temporary or long-term physical custody of the juvenile offender.
- (16) “Observation and assessment program” means any state-operated or purchased service program responsible for temporary custody of juvenile offenders for observation and assessment.

(17) "Secure facility" means any architecturally secure state-operated facility or facility operated under contract with the state which provides twenty-four (24) hour supervision and confinement for juvenile offenders committed to the custody of the department.

(18) "Staff secure facility" means a residential facility with awake staff twenty-four (24) hours a day, seven (7) days a week for intensive supervision of juveniles.

(19) "Work program" means a public service work project which employs juvenile offenders at a reasonable wage for the purpose of reimbursing victims of the juvenile offender's delinquent behavior. [1963, ch. 319, § 2, p. 876; am. 1973, ch. 27, § 1, p. 51; am. 1984, ch. 81, § 3, p. 148; am. 1989, ch. 155, § 2, p. 371; am. 1990, ch. 245, § 1, p. 696; am. 1990, ch. 355, § 1, p. 958; am. and redesisg. 1995, ch. 44, § 3, p. 65; am. 1995, ch. 277, § 1, p. 925; am. 1997, ch. 83, § 1, p. 195; am. 2000, ch. 139, § 1, p. 365.]

Compiler's notes. This section was formerly compiled as § 16-1802 and was amended and redesignated as this section by § 3 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 3 of S.L. 1989, ch. 155 is compiled as § 20-507.

Section 2 of S.L. 1990, ch. 245 is compiled as § 20-525.

Section 2 of S.L. 1997, ch 83 is compiled as § 20-504.

Section 2 of S.L. 2000, ch. 139, is compiled as § 20-504.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

Sec. to sec. ref. This section is referred to in § 39-1202.

Cited in: *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972); *Melling v. Chaney*, 126 Idaho 554, 887 P.2d 1061 (1994).

Legal Custody.

Subdivision (n) (now (14)) of this section does not anticipate physical possession and control as a prerequisite to custody. *Harris v. State*, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

Upon his release from the detention center, juvenile was still under the legal custody of the state although released to the possession of his parents, and the the state thereby qualified for the immunity afforded by § 6-904A. *Harris v. State*, Dep't of Health & Welfare, 123 Idaho 295, 847 P.2d 1156 (1993).

20-503. Department of juvenile corrections created — Appointment of director — Powers and duties of department. — (1) The department of juvenile corrections is hereby created. The department shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

(2) The department shall be under the control and supervision of a director, who shall be appointed by the governor, with the advice and consent of the senate. The director shall exercise all of the powers and duties necessary to carry out the proper administration of the department and may delegate duties to employees and officers of the department. The director shall have the authority to employ an attorney or attorneys to provide legal services to the department and such managers, assistants, clerical staff and other employees necessary to the proper functioning and administration of the department.

(3) The department of juvenile corrections shall be composed of such administrative units as may be established by the director for the proper and efficient administration of the powers and duties assigned to the

director or the department. The director shall appoint an administrator for each administrative unit within the department.

(4) The director shall have full power and authority to do all things necessary to establish and provide for the administration and operation of the department of juvenile corrections and to accomplish an orderly transition to the department of juvenile corrections and the counties of the duties and responsibilities for juvenile offenders and the juvenile justice system being performed by the department of health and welfare. It is intended that the director and staff of the department of health and welfare work cooperatively with the director and staff of the department of juvenile corrections and the counties in this effort, while continuing with their duties to juvenile offenders in the custody of the department of health and welfare until the official transfer of such duties to the department of juvenile corrections and the counties on October 1, 1995.

(5) Effective October 1, 1995, all existing commitments to the department of health and welfare made pursuant to section 16-1814(1)6., Idaho Code, are hereby transferred to the department of juvenile corrections. All powers, duties and functions with respect to those commitments are hereby transferred from the department of health and welfare to the department of juvenile corrections. The director of the department of juvenile corrections shall have all the powers and duties as may have been or could have been exercised by his predecessors in law pursuant to these commitments and he shall be the successor in law to those commitment duties without regard to the language of individual judicial orders of commitment for the juveniles. [I.C., § 20-503, as added by 1995, ch. 44, § 4, p. 65; am. 1995, ch. 277, § 2, p. 925.]

Compiler's notes. Section 16-1814 was amended and redesignated as § 20-520 effective October 1, 1995.

Section 64 of S.L. 1995, ch. 44 declared an emergency and provided that §§ 4, 58, 59, 60, 61 and 62 would be in full force and effect on

and after their passage and approval. Approved March 6, 1995.

Section 13 of S.L. 1995, ch. 277 declared an emergency and provided that § 2 should be in effect on March 21, 1995. Approved March 21, 1995.

20-504. Duties of the department of juvenile corrections. —

(1) The department shall have jurisdiction over all juveniles committed to it pursuant to chapter 5, title 20, Idaho Code.

(2) The department is responsible for all juvenile offenders committed to it by the courts of this state for confinement. The department shall also establish minimum standards for detention, care and certification of approved detention facilities based upon such standards.

(3) The department shall establish and administer all secure residential facilities including all state juvenile corrections centers.

(4) The department shall make all decisions regarding placement of juvenile offenders committed to it in the most appropriate program for supervision and treatment.

(5) The department shall establish an observation and assessment process for juvenile offenders committed to it by a court.

(6) The department shall establish liaison services with the counties or within the department's regions.

(7) The department may establish and operate work programs designed to employ juvenile offenders in public service work projects for the purpose of reimbursing victims of the juvenile offender's delinquent behavior.

(8) The department is hereby authorized and may place juveniles committed to it pursuant to this chapter in a community-based or private program; provided, that the person, agency or association operating the facility or program has been approved and has otherwise complied with all applicable state and local laws.

(9) The department shall establish minimum standards for the operation of all private residential and nonresidential facilities and programs which provide services to juvenile offenders. The standards shall be no more stringent than standards imposed for facilities operated by the department or for detention facilities operated by counties.

(10) The department shall provide technical assistance to counties establishing research-based programs for juveniles who either have been found to come under the purview of this chapter or who have had their case informally diverted pursuant to section 20-511, Idaho Code, and who have not been committed to the legal custody of the department.

(11) The department shall have authority to adopt such administrative rules pursuant to the procedures provided in chapter 52, title 67, Idaho Code, as are deemed necessary or appropriate for the functioning of the department and the implementation and administration of this act.

(12) Subject to any competitive bidding requirements otherwise provided by law, the department shall have authority to enter into contracts with a private association or organization or other public agency or organization for the inspection and licensure of detention facilities.

(13) Subject to any competitive bidding requirements otherwise provided by law, the department shall have authority to enter into contracts with private providers or local governmental agencies for the confinement or other permanent or temporary placement of juveniles committed to its custody.

(14) The department shall have authority to apply for, receive and expend federal funds, subject to appropriation by the legislature. The department shall have authority to establish guidelines for and administer the distribution of state block grant funds to counties for the employment and training of county probation officers, the establishment of secure and nonsecure residential or nonresidential facilities and programs for juvenile offenders. The department may require that a county provide matching funds as a condition of receiving a block grant. The department, by rule, in cooperation with the courts and the counties, shall establish uniform standards for county juvenile probation services, as well as qualifications for and standards for the training of juvenile probation officers.

(15) All of the powers and duties imposed upon or granted to the director of the department of health and welfare or the board of health and welfare pursuant to chapter 18, title 16, Idaho Code, are hereby transferred to the director of the department of juvenile corrections. The director shall have all such powers and duties as may have been or could have been exercised by his predecessors in law with respect to chapter 18, title 16, Idaho Code, and

shall be the successor in law to all contractual obligations entered into by his predecessor in law. [I.C., § 16-1826, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 5, p. 65; am. 1995, ch. 277, § 3, p. 925; am. 1997, ch. 83, § 2, p. 195; am. 1997, ch. 261, § 1, p. 745; am. 2000, ch. 139, § 2, p. 365; am. 2003, ch. 35, § 1, p. 154; am. 2004, ch. 50, § 2, p. 236.]

Compiler's notes. This section was amended by two 1997 acts — ch. 83, § 2 and ch. 261, § 1, both effective July 1, 1997 — which appear to be compatible and have been compiled together. The amendment by ch. 83, § 2 in subsection (3) substituted "all" for "the" following "residential facilities including" and "centers" for "center" at the end of the subsection and in subsection (8) in the first sentence added "the" following "; provided that". The amendment by ch. 261, § 1 in subsection (4) substituted "make all decisions regarding placement of" for "place" following "The department shall".

This section was formerly compiled as § 16-1826 and was amended and redesignated as this section by § 5 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 4 of S.L. 1995, ch. 277 is compiled as § 20-508.

Section 1 of S.L. 1997, ch. 83 is compiled as § 20-502.

Section 1 of S.L. 2000, ch. 139 is compiled as § 20-502.

Sections 1 and 3 of S.L. 2004, ch. 50 are compiled as §§ 18-2505 and 20-524, respectively.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

20-504A. State juvenile corrections centers — Purposes — Powers and duties of the department and the director. — (1) The purposes of a juvenile corrections center shall be:

- (a) The care, control and competency development of adjudicated juvenile offenders meeting standards for admission as adopted by the Idaho supreme court;
- (b) The provision pursuant to agreement with the counties of detention services for juveniles subject to administrative or court order;
- (c) The provision of observation and assessment services for juveniles committed to the department of juvenile corrections; and
- (d) To accept for placement those individuals sentenced to a state juvenile corrections center by a district court, or pursuant to agreement with the board of correction, subsequent to waiver of juvenile court jurisdiction.

(2) The department shall administer and provide general oversight of all state juvenile corrections centers and any other secure or nonsecure facilities as required by the juvenile corrections act.

(3) The department shall assure that the educational programs of state juvenile corrections centers are in compliance with educational standards for secure juvenile facilities which are approved by the Idaho state board of education or an accrediting association recognized by the Idaho state board of education.

(4) The department shall have the power to promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, for the administration and operation of state juvenile corrections centers.

(5) The director shall have the power:

- (a) To employ, fix the salary and prescribe the duties of a superintendent for each juvenile corrections center. The superintendent shall be a nonclassified employee and shall serve at the pleasure of the director.

With the advice of the director, the superintendent may appoint and prescribe the duties of assistants, instructors, specialists and other employees required for the operation of the center;

(b) To remove any employee of a juvenile corrections center for cause;

(c) To ensure that all teachers, except specialists, hold teaching certificates issued under the authority of the state board of education which are valid for the grades and subjects taught. All specialists shall hold diplomas from an accredited school of their specialty;

(d) To have, at all times, general supervision and control of all property, real and personal, appertaining to the center, and to insure the same; and

(e) To expend tax moneys appropriated, or otherwise placed to the credit of the center for maintenance and operation and to account for the same as prescribed by law.

(6) Wherever the term "State Youth Training Center" or "State Youth Services Center" shall appear in the Idaho Code it shall mean any state juvenile corrections center. [I.C., § 20-504A, as added by 1997, ch. 83, § 3, p. 195.]

Compiler's notes. Section 4 of S.L. 1997, ch. 83 repealed §§ 20-543, 20-545 and 20-546.

20-505. Jurisdiction. — Subject to the prior jurisdiction of the United States, the court shall have exclusive, original jurisdiction over any juvenile and over any adult who was a juvenile at the time of any act, omission or status, in the county in which the juvenile resides, or in the county in which the act, omission or status allegedly took place, in the following cases:

(1) Where the act, omission or status is prohibited by federal, state, local or municipal law or ordinance by reason of minority only, regardless of where the same occurred;

(2) Where the act or omission is a violation of any federal, state, local or municipal law or ordinance which would be a crime if committed by an adult, regardless of where the same occurred;

(3) Concerning any juvenile where the juvenile comes under the purview of the interstate compact on juveniles as set forth in chapter 19, title 16, Idaho Code;

(4) This chapter shall not apply to juvenile violators of beer, wine or other alcohol and tobacco laws; except that a juvenile violator under the age of fourteen (14) years at the time of the violation may, at the discretion of the court, be treated under the provisions of this chapter;

(5) This chapter shall not apply to the violent juvenile offender, as defined in this chapter;

(6) This chapter shall not apply to juvenile violators of traffic, watercraft, fish and game, failure to obey a misdemeanor citation and criminal contempt laws; except that a juvenile violator under the age of fourteen (14) years at the time of such violation may, at the discretion of the court, be treated under the provisions of this chapter;

(7) This chapter shall not apply to juvenile sex offenders who violate the provisions of section 18-8414, Idaho Code. [I.C., § 16-1803, as added by 1976, ch. 233, § 2, p. 823; am. 1981, ch. 112, § 1, p. 168; am. 1981, ch. 222,

§ 6, p. 412; am. 1982, ch. 110, § 1, p. 311; am. 1984, ch. 81, § 4, p. 148; am. 1990, ch. 355, § 2, p. 958; am. 1993, ch. 154, § 2, p. 390; am. 1994, ch. 150, § 1, p. 344; am. 1994, ch. 414, § 2, p. 1302; am. and redesisg. 1995, ch. 44, § 6, p. 65; am. 1996, ch. 261, § 3, p. 857; am. 1998, ch. 69, § 1, p. 262; am. 1999, ch. 388, § 1, p. 1083; am. 1999, ch. 389, § 1, p. 1085; am. 2002, ch. 185, § 1, p. 536; am. 2004, ch. 270, § 3, p. 752.]

Compiler's notes. This section was formerly compiled as § 16-1803 and was amended and redesignated as this section by § 6 of S.L. 1995, ch. 44, effective October 1, 1995.

This section was amended by two 1999 acts — ch. 388, § 1, effective July 1, 1999 and ch. 389, § 1, effective July 1, 1999 — which appear to be compatible and have been compiled together.

The amendment by S.L. 1999, ch. 388, § 1 deleted former subdivision (6) and redesignated subdivision (7) as subdivision (6).

The amendment by S.L. 1999, ch. 389, § 1 deleted subdivision (7).

Section 5 of S.L. 1981, ch. 222 is compiled as § 23-612.

Section 5 of S.L. 1984, ch. 81 is compiled as § 20-507.

Section 3 of S.L. 1990, ch. 355 is compiled as § 20-510.

Section 1 of S.L. 1993, ch. 154 is compiled as § 18-1502B.

Section 1 of S.L. 1994, ch. 414 is compiled as § 18-1502C.

Sections 2 and 4 of S.L. 1996, ch. 261 are compiled as §§ 18-1502C and 63-2552A, respectively.

Section 2 of S.L. 1999, ch. 388 is compiled as § 18-1502C.

Sections 2 and 4 of S.L. 2004, ch. 270 are compiled as §§ 18-8414 and 18-8307, respectively.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 6 of S.L. 1996, ch. 261 provided that §§ 1-4 should be in full force and effect July 1, 1996 and § 5 should be in full force and effect March 28, 1997.

Sec. to sec. ref. This section is referred to in § 16-1910.

Cited in: State v. Anderson, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985); Kinley v. State, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

ANALYSIS

Felony traffic offenses.

Jurisdiction found.

Traffic infractions.

Tried as adult.

Waiver of jurisdiction.

Felony Traffic Offenses.

Felony traffic offenses are not excluded from juvenile court jurisdiction as traffic violations because felonies are not "violations" under the Youth Rehabilitation Act (now Juvenile Corrections Act). *Zamora v. State*, 123 Idaho 192, 846 P.2d 194 (1993).

Jurisdiction Found.

Where a petition alleged that defendant was a juvenile when the charged offense of battery occurred, the petition thereby alleged the jurisdiction of the juvenile court. (See 2004 amendment of this section). *State v. Doe* (In re Doe), — Idaho —, 79 P.3d 165 (Ct. App. 2003).

Traffic Infractions.

Cases involving minors accused of traffic infractions or offenses are processed in the same manner as adult cases; the Youth Rehabilitation Act (now Juvenile Corrections Act) does not extend to traffic violations. *State v. Ritchie*, 114 Idaho 528, 757 P.2d 1247 (Ct. App. 1988).

Tried as Adult.

This section and § 18-216 provide that it is the juvenile court which has exclusive jurisdiction over any person who is charged with having violated a law before he or she turned eighteen years of age. Moreover, except in the case of serious violent crimes which are automatically triable within the district court under § 20-509, the district court may only try a person as an adult who would otherwise come within the purview of Youth Rehabilitation Act (YRA) (now Juvenile Corrections Act) if a court exercising jurisdiction under the YRA waives its jurisdiction by holding a waiver hearing under § 18-216(2). (See 2004 amendment of this section). *State v. Walsh*, 124 Idaho 714, 864 P.2d 160 (1993).

Waiver of Jurisdiction.

In the event a person between the ages of fourteen and eighteen is charged with or pleads guilty to any crime which is not specifically enumerated as an exception to Youth Rehabilitation Act (now Juvenile Corrections Act) jurisdiction under § 20-509 (or which is not included in the exceptions to juvenile court jurisdiction found in this section), the minor remains under the jurisdiction of the Youth Rehabilitation Act; however, the prosecutor, the minor or the district court itself

may file a motion pursuant to § 20-508 seeking to waive Youth Rehabilitation Act jurisdiction. In that situation, the district court must follow the procedures set forth in § 20-508, and hold a hearing to determine whether Youth Rehabilitation Act jurisdiction should

be waived. In the absence of the required motion and hearing, the minor remains under Youth Rehabilitation Act jurisdiction for disposition. *State v. Larios*, 125 Idaho 727, 874 P.2d 538 (1994).

DECISIONS UNDER PRIOR LAW

Conviction of Crime.

Minors found to be guilty of certain criminal charges were properly found, by the court, to be juvenile delinquents. *Hewlett v. Probate Court*, 66 Idaho 690, 168 P.2d 77 (1946).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 16-21.

43 C.J.S., Infants, §§ 43, 53, 200.

Marriage as affecting jurisdiction of juvenile court over delinquent or dependent. 14 A.L.R.2d 336.

Homicide by juvenile as within jurisdiction of juvenile court. 48 A.L.R.2d 663.

Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 A.L.R.2d 506.

Extradition of juveniles. 73 A.L.R.3d 700.

20-506. Transfer from other courts. — If during the pendency of a criminal or quasi-criminal charge against any juvenile in any other court, it shall be ascertained that the juvenile was under the age of eighteen (18) years at the time of committing the alleged offense, except where such juvenile has left the state, or where said charge is that such juvenile is a juvenile traffic, beer, wine or other alcohol or tobacco violator, or is within the purview of section 20-508(1)(a) or (1)(b), Idaho Code, it shall be the duty of such court forthwith to transfer the case, together with all the papers, documents and testimony connected therewith, to the court having jurisdiction over the juvenile with respect to the offense charged. The court making such transfer shall order the juvenile to be taken forthwith to the court to which the transfer is being made or place of detention designated by the court or shall release the juvenile to the custody of some suitable person to be brought before the court at a time designated. The court to which the case is transferred shall then proceed as provided in this act. [1963, ch. 319, § 4, p. 876; am. 1981, ch. 222, § 7, p. 412; am. 1982, ch. 110, § 2, p. 311; am. and redesign. 1995, ch. 44, § 7, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1804 and was amended and redesignated as this section by § 7 of S.L. 1995, ch. 44, effective October 1, 1995.

The words "this act" refer to S.L. 1963, ch. 319, compiled as §§ 20-501 — 20-547.

Section 3 of S.L. 1982, ch. 110 is compiled as § 18-1502.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Cited in: *State v. McKeown*, 108 Idaho 452, 700 P.2d 74 (Ct. App. 1985); *State v. Matthews*, 108 Idaho 453, 700 P.2d 75 (Ct. App. 1985).

ANALYSIS

Applicability of § 20-509.

Continuing jurisdiction.

Felony traffic offenses.

Applicability of § 20-509.

This section, governing the transfer of juveniles, is operative only when the juvenile court has jurisdiction to proceed; former § 16-1806A (now § 20-509), however, excludes certain crimes ab initio from juvenile court jurisdiction. Thus, there is no conflict between these sections, since this section is not applicable to those cases coming within the purview of former § 16-1806A (now see § 20-509). *State v. Anderson*, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985).

Continuing Jurisdiction.

This section by reference to subdivisions (1)(a) and (1)(b) of former § 16-1806 (now § 20-508) means that criminal proceedings commenced against a defendant who was less than eighteen at the time the offense was

allegedly committed by him may continue only where the jurisdiction under the Youth Rehabilitation Act (now Juvenile Corrections Act, this chapter) has been previously waived pursuant to former § 16-1806(1). *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972).

Felony Traffic Offenses.

Felony traffic offenses are not excluded

from juvenile court jurisdiction as traffic violations because felonies are not "violations" under the Youth Rehabilitation Act (now Juvenile Corrections Act). *Zamora v. State*, 123 Idaho 192, 846 P.2d 194 (1993).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 36-44.

43 C.J.S., Infants, §§ 45, 200.

20-507. Retention of jurisdiction. — Jurisdiction obtained by the court in the case of a juvenile shall be retained by it for the purposes of this act until he becomes twenty-one (21) years of age, unless terminated prior thereto. If a juvenile under the jurisdiction of the court and after attaining eighteen (18) years of age, is charged with a felony, he shall be treated as any other adult offender. If a person eighteen (18) years of age or older already under court jurisdiction is convicted of a felony, that conviction shall terminate the jurisdiction of the court, provided, however, that nothing herein contained shall prohibit any court from proceeding as provided in section 20-508(2), Idaho Code. [1963, ch. 319, § 5, p. 876; am. 1984, ch. 81, § 5, p. 148; am. 1989, ch. 155, § 3, p. 371; am. and redesisg. 1995, ch. 44, § 8, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1805 and was amended and redesignated as this section by § 8 of S.L. 1995, ch. 44, effective October 1, 1995.

S.L. 1969, ch. 100, § 1 abolished the probate courts and provided that, wherever the words probate court appear, they shall mean the district court or the magistrate's division of the district court as the case may be.

Sections 4 and 6 of S.L. 1984, ch. 81 are

compiled as §§ 20-505 and 20-509, respectively.

Sections 2 and 4 of S.L. 1989, ch. 155 are compiled as §§ 20-502 and 20-510.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Cited in: *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

20-508. Waiver of jurisdiction and transfer to other courts. — (1) After the filing of a petition and after full investigation and hearing, the court may waive jurisdiction under the juvenile corrections act over the juvenile and order that the juvenile be held for adult criminal proceedings when:

- (a) A juvenile is alleged to have committed any of the crimes enumerated in section 20-509, Idaho Code; or
- (b) A juvenile is alleged to have committed an act other than those enumerated in section 20-509, Idaho Code, after the child became fourteen (14) years of age which would be a crime if committed by an adult; or
- (c) An adult at the time of the filing of the petition is alleged to have committed an act prior to his having become eighteen (18) years of age which would be a felony if committed by an adult, and the court finds that the adult is not committable to an institution for the mentally deficient or mentally ill, is not treatable in any available institution or facility available to the state designed for the care and treatment of juveniles, or that the safety of the community requires the adult continue under restraint; or

(d) An adult already under the jurisdiction of the court is alleged to have committed a crime while an adult.

(2) A motion to waive jurisdiction under the juvenile corrections act and prosecute a juvenile under the criminal law may be made by the prosecuting attorney, the juvenile, or by motion of the court upon its own initiative. The motion shall be in writing and contain the grounds and reasons in support thereof.

(3) Upon the filing of a motion to waive jurisdiction under the juvenile corrections act, the court shall enter an order setting the motion for hearing at a time and date certain and shall order a full and complete investigation of the circumstances of the alleged offense to be conducted by county probation, or such other agency or investigation officer designated by the court.

(4) Upon setting the time for the hearing upon the motion to waive jurisdiction, the court shall give written notice of said hearing to the juvenile, and the parents, guardian or custodian of the juvenile, and the prosecuting attorney, at least ten (10) days before the date of the hearing, or a lesser period stipulated by the parties, and such notice shall inform the juvenile and the parents, guardian or custodian of the juvenile of their right to court appointed counsel. Service of the notice shall be made in the manner prescribed for service of a summons under section 20-512, Idaho Code.

(5) The hearing upon the motion to waive jurisdiction shall be held in the same manner as an evidentiary hearing upon the original petition and shall be made part of the record.

(6) If as a result of the hearing on the motion to waive jurisdiction the court shall determine that jurisdiction should not be waived, the petition shall be processed in the customary manner as a juvenile corrections act proceeding. However, in the event the court determines, as a result of the hearing, that juvenile corrections act jurisdiction should be waived and the juvenile should be prosecuted under the criminal laws of the state of Idaho, the court shall enter findings of fact and conclusions of law upon which it bases such decision together with a decree waiving juvenile corrections act jurisdiction and binding the juvenile over to the authorities for prosecution under the criminal laws of the state of Idaho.

(7) No motion to waive juvenile corrections act jurisdiction shall be recognized, considered, or heard by the court in the same case once the court has entered an order or decree in that case that said juvenile has come within the purview of the juvenile corrections act, and all subsequent proceedings after the decree finding the juvenile within the purview of the act must be under and pursuant to the act and not as a criminal proceeding.

(8) In considering whether or not to waive juvenile court jurisdiction over the juvenile, the juvenile court shall consider the following factors:

(a) The seriousness of the offense and whether the protection of the community requires isolation of the juvenile beyond that afforded by juvenile facilities;

(b) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons;

- (d) The maturity of the juvenile as determined by considerations of his home, environment, emotional attitude, and pattern of living;
- (e) The juvenile's record and previous history of contacts with the juvenile corrections system;
- (f) The likelihood that the juvenile will develop competency and life skills to become a contributing member of the community by use of facilities and resources available to the court;
- (g) The amount of weight to be given to each of the factors listed in subsection (8) of this section is discretionary with the court, and a determination that the juvenile is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one (1) or a combination of the factors set forth above, which shall be recited in the order of waiver.

(9) If the court does not waive jurisdiction and order a juvenile or adult held for criminal proceedings, the court in a county other than the juvenile's or adult's home county, after entering a decree that the juvenile or adult is within the purview of this chapter, may certify the case for sentencing to the court of the county in which the juvenile or adult resides upon being notified that the receiving court is willing to accept transfer. In the event of a transfer, which should be made unless the court finds it contrary to the interest of the juvenile or adult, the jurisdiction of the receiving court shall attach to the same extent as if the court had original jurisdiction.

(10) Upon conviction of a juvenile held for adult criminal proceedings under this section, the sentencing judge may, if a finding is made that adult sentencing measures would be inappropriate:

- (a) Sentence the convicted person in accordance with the juvenile sentencing options set forth in this chapter; or
- (b) Sentence the convicted person to the county jail or to the custody of the state board of correction but suspend the sentence or withhold judgment pursuant to section 19-2601, Idaho Code, and commit the defendant to the custody of the department of juvenile corrections for an indeterminate period of time in accordance with section 20-520(1)(q), Idaho Code. The court, in its discretion, may order that the suspended sentence or withheld judgment be conditioned upon the convicted person's full compliance with all reasonable program requirements of the department of juvenile corrections. Such a sentence may also set terms of probation, which may be served under the supervision of county juvenile probation. However, in no event may the total of the actual time spent by the convicted person in the custody of the department plus any adult sentence imposed by the court exceed the maximum period of imprisonment that could be imposed on an adult convicted of the same crime.
- (c) If a convicted person is given a suspended sentence or withheld judgment conditioned upon the convicted person's compliance with all reasonable program requirements of the department pursuant to paragraph (b) of this subsection, and if the department reasonably believes that the convicted person is failing to comply with all reasonable program requirements, the department may petition the sentencing court to revoke the commitment to the department and transfer the convicted

person to the county jail or to the custody of the state board of correction for the remainder of the sentence. [I.C., § 16-1806, as added by 1977, ch. 165, § 2, p. 427; am. 1981, ch. 162, § 1, p. 284; am. and redesign. 1995, ch. 44, § 9, p. 65; am. 1995, ch. 47, § 1, p. 111; am. 1995, ch. 277, § 4, p. 925; am. 1997, ch. 82, § 1, p. 192; am. 1999, ch. 390, § 1, p. 1086; am. 2000, ch. 246, § 2, p. 686.]

Compiler's notes. This section was formerly compiled as § 16-1806 and was amended and redesignated as this section by § 9 of S.L. 1995, ch. 44, effective October 1, 1995.

Sections 3 and 5 of S.L. 1995, ch. 277 are compiled as §§ 20-504 and 20-516, respectively.

Section 2 of S.L. 1997, ch. 82 is compiled as § 20-524.

Section 1 of S.L. 2000, ch. 246 is compiled as § 19-2601.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

Cross ref. Appointment of custodian for minor, § 16-1601 et seq.

Appointment of guardian for minor, § 15-5-201 et seq.

"Mentally deficient or ill person," defined, § 66-317.

Sec. to sec. ref. This section is referred to in §§ 18-2505, 18-2506, 20-506, 20-507, 20-509, 20-518, 20-520 and 20-528.

Cited in: State v. Lute, 108 Idaho 905, 702 P.2d 1365 (Ct. App. 1985); State v. Dillard, 110 Idaho 834, 718 P.2d 1272 (Ct. App. 1986).

ANALYSIS

Application.

Discretion of court.

Double jeopardy.

Legislative intent.

Purpose.

Waiver.

—Criteria.

—Procedural requirements.

—Proper.

—Review.

Application.

This section and § 18-216 make it clear that not all chronological age juveniles will receive treatment as juveniles. Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978).

Discretion of Court.

The magistrate did not abuse his discretion in waiving Youth Rehabilitation Act (now Juvenile Corrections Act) jurisdiction, where there was ample competent evidence in the

record from which the magistrate reasonably concluded that defendant was a dangerous individual; that a real possibility existed that he would not be rehabilitated before he reached the age of 21; and that protection of the community required his isolation beyond that afforded by the juvenile facilities. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Double Jeopardy.

This section does not authorize an adjudication or determination of facts beyond the existence of probable cause to believe that a particular crime was committed and that a particular juvenile committed it; it merely authorizes the trial court to consider circumstances in aggravation as bearing on the question of whether juvenile jurisdiction should be retained and a determination which exceeds that narrow scope could result in the attachment of double jeopardy and a plea in bar to any proceedings in an adult court. Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978).

Legislative Intent.

It was entirely proper for the magistrate, in considering defendant's record and history of previous contacts with the juvenile justice system, to allow testimony concerning his misdemeanor offenses and dismissed felony charges, inasmuch as there is nothing in the Youth Rehabilitation Act (now Juvenile Corrections Act) to indicate the legislature, in referring to a child's "record" and "contacts with the juvenile justice system," intended to limit the magistrate's consideration to felony type conduct only. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Purpose.

This section and its antecedents were intended to implement the statutory provisions of § 18-216 and to the extent of the conflict, § 18-216 controls. Wolf v. State, 99 Idaho 476, 583 P.2d 1011 (1978).

The sole function of the transfer hearing is to determine whether the interests of the child and society are best served by Youth Rehabilitation Act proceedings or by adult proceedings, and the hearings upon which the determination is made are to be informal in nature. State v. Christensen, 100 Idaho 631, 603 P.2d 586 (1979).

Waiver.**—Criteria.**

A probable cause finding in conjunction with the procedure of waiving juvenile jurisdiction is not required by the Idaho or federal constitutions, since when a juvenile court waives jurisdiction an adult court must still conduct a preliminary hearing at which probable cause must be determined and if juvenile jurisdiction is not waived a probable cause determination is made by the juvenile court as to whether and how to proceed on the juvenile petition. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

In proceedings to determine whether or not juvenile jurisdiction should be waived where the magistrate found that each of the defendants was emotionally and mentally mature and that the prognosis for each defendant under available juvenile rehabilitation programs was unsatisfactory and that they would likely remain dangerous to the public if released at age 21 and in the interim each would be likely to disrupt the rehabilitation of other juveniles, such finding met the criteria necessary for waiver of jurisdiction set forth in *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

The nature of the accusation is a relevant factor for the court to consider in deciding whether or not to waive jurisdiction. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

Where district court chose to review decision of magistrate denying waiver of juvenile court jurisdiction as an appellate court and then elected to hear additional evidence that California was terminating its contract with Idaho to provide juvenile rehabilitation facilities, it was appropriate for the district court to weigh de novo the factors considered by the magistrate along with the factor established by the additional evidence; it was discretionary with the district court to base its decision on any one or a combination of these factors under subsection (8) of this section as long as the district court accepted those findings of the magistrate which were unaffected by the additional evidence. *Dillard v. State*, 101 Idaho 917, 623 P.2d 1294 (1981).

—Procedural Requirements.

In proceeding to determine whether or not juvenile jurisdiction should be waived the

only determination by the magistrate was the existence of probable cause to justify transfer to the adult court and such determination could be based on hearsay and need not be tested by cross-examination and confrontation. *Wolf v. State*, 99 Idaho 476, 583 P.2d 1011 (1978).

In the event a person between the ages of fourteen and eighteen is charged with or pleads guilty to any crime which is not specifically enumerated as an exception to Youth Rehabilitation Act (now Juvenile Corrections Act) jurisdiction under § 20-509 (or which is not included in the exceptions to juvenile court jurisdiction found in this section), the minor remains under the jurisdiction of the Youth Rehabilitation Act; however, the prosecutor, the minor or the district court itself may file a motion pursuant to this section seeking to waive Youth Rehabilitation Act jurisdiction. In that situation, the district court must follow the procedures set forth in this section, and hold a hearing to determine whether Youth Rehabilitation Act jurisdiction should be waived. In the absence of the required motion and hearing, the minor remains under Youth Rehabilitation Act jurisdiction for disposition. *State v. Larios*, 125 Idaho 727, 874 P.2d 538 (1994).

—Proper.

Where the magistrate ordered a full investigation of the circumstances of the alleged offense, and considered the results of the investigation prior to waiving juvenile jurisdiction, the magistrate complied with this section. *Zamora v. State*, 123 Idaho 192, 846 P.2d 194 (1993).

—Review.

The magistrate's order waiving its jurisdiction over a juvenile is a final order of the magistrate's court and must be appealed to the district court prior to further proceedings in district court in the matter. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978).

Although a hearing was required before defendant could waive jurisdiction to district court for charges stemming from conduct that occurred when he was a minor, defendant waived the issue by failing to object to the lack of such a hearing before appeal. *State v. Kavajecz*, — Idaho —, 80 P.3d 1083 (2003).

DECISIONS UNDER PRIOR LAW**ANALYSIS**

Investigation and hearing.
Investigation inadequate.
Jurisdiction.
—Selection.
Notice.

Waiver.
—Criteria.
—Review.

Investigation and Hearing.

Prior to waiving jurisdiction, magistrate is required to conduct a full investigation and

hearing which must be prefaced by timely notice which adequately informs the parties of the specific issues they must be prepared to meet. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

This section of the Youth Rehabilitation Act (now Juvenile Corrections Act, this chapter), when read in conjunction with § 1-103 and former § 16-1802(a) (now 20-502(1)), provides that a child subject to the act may be held for prosecution as an adult rather than for proceedings as a juvenile under the Youth Rehabilitation Act only after a full investigation and hearing. *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972).

The legislative intent as to the decision of whether a youthful offender should be prosecuted in a criminal proceeding or processed under the provisions of the Youth Rehabilitation Act (now Juvenile Corrections Act, this chapter), should be a judicial one made after a full investigation and hearing. *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972).

Investigation Inadequate.

The investigation required by this section was inadequate where the record disclosed nothing concerning the child's mental and emotional development beyond a reference to family-wise counseling, no inquiry into the availability of facilities, programs and personnel capable of affording rehabilitative care and contained a description of the offenses alleged and a vague reference to previous offenses. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

A juvenile's right to a full investigation cannot be avoided by having none at all. *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972).

Jurisdiction.

When an order is entered waiving juvenile jurisdiction, the jurisdiction of the magistrate's division of the district court, sitting as a juvenile court, is extinguished and at the same time there is effected a transfer of jurisdiction to the district court sitting as an adult criminal court. *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977).

—Selection.

After a review of the facts and circumstances, court could elect to assume jurisdiction under former I.C. § 16-1803 (now § 20-505), based on a determination that the accused was a violator amenable to rehabilitation under the Youth Rehabilitation Act, or could elect to waive jurisdiction under this section, but could not do both. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

Where a juvenile in detention in Idaho for probation violation was the subject of a request for extradition from Colorado for mur-

der, a hearing in juvenile court to release its jurisdiction under this section was beyond extradition procedural requirements. *Snyder v. State*, 95 Idaho 643, 516 P.2d 700 (1973).

Notice.

Where summonses issued to a child and his parents for interviews, a primary purpose of which was to determine whether jurisdiction under the Youth Rehabilitation Act should be waived, contained no reference to this critically important determination, the requirement of timely and adequate notice required by due process was not satisfied. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

Waiver.

—Criteria.

Jurisdiction ordinarily is waived when (1) the defendant has acquired such a degree of emotional or mental maturity that he is not receptive to rehabilitative programs designed for children; (2) although the defendant is immature his disturbance has eluded exhaustive prior efforts at correction through existing juvenile programs; or (3) the defendant is immature and might be treated, but the nature of his difficulty is likely to render him dangerous to the public, if released at age twenty-one or to disrupt the rehabilitation of other children in the program prior to his release. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

A valid waiver of jurisdiction must be based on a specific finding, supported by substantial and competent evidence obtained in the full investigation required by this section, that the defendant is not amenable to rehabilitative treatment under juvenile court jurisdiction. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

Since the former statute provided no standards for determining when jurisdiction could be waived, state courts had to fashion controlling criteria when the waiver statute was subject to constitutional challenge. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

Each criterion for waiver of jurisdiction requires that the child's potential for rehabilitation be evaluated in terms of his present state of development and the availability of facilities, programs and personnel capable of providing effective individualized treatment. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

—Review.

A review of a juvenile jurisdiction waiver must be sought before the charges as an adult have proceeded to trial and, in effectuating such an appeal, review should first be sought in the district court while proceedings in the adult court are held in abeyance pending

resolution of the waiver issue. State v. Collateral References. 43 C.J.S., Infants, Harwood, 98 Idaho 793, 572 P.2d 1228 (1977). § 45.

20-509. Violent offenses, controlled substances violations near schools and offenders. — (1) Any juvenile, age fourteen (14) years to age eighteen (18) years, who is alleged to have committed any of the following crimes or any person under age fourteen (14) years who is alleged to have committed any of the following crimes and, pursuant to section 20-508, Idaho Code, has been ordered by the court to be held for adult criminal proceedings:

- (a) Murder of any degree or attempted murder;
- (b) Robbery;
- (c) Rape, but excluding statutory rape;
- (d) Forcible sexual penetration by the use of a foreign object;
- (e) Infamous crimes against nature, committed by force or violence;
- (f) Mayhem;
- (g) Assault or battery with the intent to commit any of the above serious felonies;
- (h) A violation of the provisions of section 37-2732(a)(1)(A), (B) or (C), Idaho Code, when the violation occurred on or within one thousand (1,000) feet of the property of any public or private primary or secondary school, or in those portions of any building, park, stadium or other structure or grounds which were, at the time of the violation, being used for an activity sponsored by or through such a school;
- (i) Arson in the first degree and aggravated arson;

shall be charged, arrested and proceeded against by complaint, indictment or information as an adult. All other felonies or misdemeanors charged in the complaint, indictment or information, which are based on the same act or transaction or on one (1) or more acts or transactions as the violent or controlled substances offense shall similarly be charged, arrested and proceeded against as an adult. Any juvenile proceeded against pursuant to this section shall be accorded all constitutional rights, including bail and trial by jury, and procedural safeguards as if that juvenile were an adult defendant.

(2) Once a juvenile has been formally charged or indicted pursuant to this section or has been transferred for criminal prosecution as an adult pursuant to the waiver provisions of section 20-508, Idaho Code, or this section, the juvenile shall be held in a county jail or other adult prison facility unless the court, after finding good cause, orders otherwise.

(3) Except as otherwise allowed by subsection (4) of this section, once a juvenile has been found to have committed the offense for which the juvenile was charged, indicted or transferred pursuant to this section or section 20-508, Idaho Code, or has been found guilty or pled guilty to a lesser offense or amended charge growing out of or included within the original charge, whether or not such lesser offense or amended charge is included within the acts enumerated in subsection (1) of this section, the juvenile shall thereafter be handled in every respect as an adult. For any subsequent violation of Idaho law, the juvenile shall be handled in every respect as an adult.

(4) Upon the conviction of a juvenile pursuant to this section, the sentencing judge may, if a finding is made that adult sentencing measures would be inappropriate:

(a) Sentence the convicted person in accordance with the juvenile sentencing options set forth in this chapter; or

(b) Sentence the convicted person to the county jail or to the custody of the state board of correction but suspend the sentence or withhold judgment pursuant to section 19-2601, Idaho Code, and commit the defendant to the custody of the department of juvenile corrections for an indeterminate period of time in accordance with section 20-520(1)(q), Idaho Code. The court, in its discretion, may order that the suspended sentence or withheld judgment be conditioned upon the convicted person's full compliance with all reasonable program requirements of the department of juvenile corrections. Such a sentence may also set terms of probation, which may be served under the supervision of county juvenile probation. However, in no event may the total of the actual time spent by the convicted person in the custody of the department plus any adult sentence imposed by the court exceed the maximum period of imprisonment that could be imposed on an adult convicted of the same crime.

(c) If a convicted person is given a suspended sentence or withheld judgment conditioned upon the convicted person's compliance with all reasonable program requirements of the department pursuant to paragraph (b) of this subsection, and if the department reasonably believes that the convicted person is failing to comply with all reasonable program requirements, the department may petition the sentencing court to revoke the commitment to the department and transfer the convicted person to the county jail or to the custody of the state board of correction for the remainder of the sentence. [I.C., § 16-1806A, as added by 1981, ch. 151, § 1, p. 262; am. 1984, ch. 81, § 6, p. 148; am. 1990, ch. 268, § 5, p. 755; am. and redesign. 1995, ch. 44, § 10, p. 65; am. 1995, ch. 46, § 1, p. 110; am. 1995, ch. 47, § 2, p. 111; am. 1995, ch. 48, § 1, p. 114; am. 1997, ch. 142, § 1, p. 413; am. 2000, ch. 73, § 1, p. 686; am. 2000, ch. 246, § 3, p. 155.]

Compiler's notes. This section was formerly compiled as § 16-1806A and was amended and redesignated as this section by § 10 of S.L. 1995, ch. 44, effective October 1, 1995.

This section was amended by two 2000 acts — ch. 73, § 1 and ch. 246, § 3, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 73, § 1, in subsection (1), inserted "years" following "fourteen (14)", in subdivision (1)(i), inserted "(1)" following "or on one"; in subsection (3), inserted "pursuant to this section or section 20-508, Idaho Code" following "indicted or transferred"; and made minor punctuation and stylistic changes.

The 2000 amendment by ch. 246, § 3, in subsection (1), inserted "years" following

"fourteen (14)", in subdivision (1)(i), inserted "(1)" following "or on one"; in subsection (3), added "Except as otherwise allowed by subsection (4) of this section,"; rewrote the introductory language of subsection (4) which formerly read: "The sentencing judge of any juvenile convicted pursuant to this section may choose to sentence the convicted person in accordance with the juvenile sentencing options set forth in this act, if a finding is made that adult sentencing measures would be inappropriate"; and added subdivision (4)(a) through (4)(c); and made minor punctuation and stylistic changes.

Sections 5 and 7 of S.L. 1984, ch. 81 are compiled as §§ 20-507 and 20-511, respectively.

Section 4 of S.L. 1990, ch. 268 is compiled as § 37-2739A.

Section 15 of S.L. 1984, ch. 81 provided that section 6 of the act should take effect July 1, 1984, while the other sections of the act should take effect on July 1, 1985.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect October 1, 1995.

Sec. to sec. ref. This section is referred to in §§ 20-508, 20-518, 20-520, 18-2505, 18-2506 and 67-2907.

Cited in: State v. McKeown, 108 Idaho 452, 700 P.2d 74 (Ct. App. 1985); State v. Matthews, 108 Idaho 453, 700 P.2d 75 (Ct. App. 1985); State v. Lute, 108 Idaho 905, 702 P.2d 1365 (Ct. App. 1985); State v. Doe, 137 Idaho 691, 52 P.3d 335 (Ct. App. 2002).

ANALYSIS

Applicability of § 20-506.

Application.

Best interests of defendant.

Consideration of age.

Equal protection.

Indictment.

Jurisdiction.

Sentencing.

Strict construction.

Applicability of § 20-506.

Section 20-506, governing the transfer of juveniles, is operative only when the juvenile court has jurisdiction to proceed; this section, however, excludes certain crimes ab initio from juvenile court jurisdiction. Thus, there is no conflict between these sections, since § 20-506 is not applicable to those cases coming within the purview of this section. State v. Anderson, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985).

Application.

This section applies to persons who are age 14 years to age 18 years at the time the act is committed. State v. Anderson, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985).

Because lewd conduct with a minor under the age of 16 was not an enumerated offense under Idaho Code § 20-509 for which defendant could have been tried as an adult, defendant could not be tried for or convicted of that crime, which would otherwise have been a criminal act if committed by someone over the age of 14, where the evidence showed that he was 13 years old for most of the period during which the sexual conduct at issue occurred. State v. Kavajecz, — Idaho —, 80 P.3d 1083 (2003).

Best Interests of Defendant.

Where defendant did not contend there was any error in court's decision to sentence him as an adult nor did the record on appeal indicate that he ever requested that the court impose sentence pursuant to the Youth Reha-

bilitation Act (now Juvenile Corrections Act of 1995), no error was shown with respect to the District Court's consideration of the best interests of defendant. State v. Moore, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Consideration of Age.

In deciding whether a 14-year-old defendant should be sentenced as an adult at the sentencing hearing, the trial court considered defendant's youth and what was in defendant's best interest. This was the appropriate time for the trial court to give special consideration to these factors. After the decision to sentence defendant as an adult was made, the fact that defendant was only 14 was one circumstance, along with all the other circumstances the trial court had before it, to be considered in arriving at an appropriate sentence. State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991).

Although the best interest of the child is not one of the goals of sentencing to be considered when a juvenile is sentenced as an adult, a juvenile defendant's age is one of the many circumstances that a sentencing court may and should consider in fashioning an appropriate sentence. State v. Moore, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Equal Protection.

This section does not violate the fourteenth amendment's equal protection clause, because the classification barring violent youthful offenders from juvenile rehabilitation centers bears a rational relationship to an important legislative objective of excluding minors who commit certain violent acts from the jurisdiction of the juvenile court. State v. Anderson, 108 Idaho 454, 700 P.2d 76 (Ct. App. 1985).

Indictment.

Where an indictment, charging juvenile defendant with battery with intent to commit rape and burglary in the second degree, as drafted failed to allege an intent to commit forcible rape, the indictment did not charge any offense for which defendant could be prosecuted automatically as an adult under this section, so as to confer jurisdiction upon the district court. State v. Juhasz, 124 Idaho 851, 865 P.2d 178 (Ct. App. 1993).

Jurisdiction.

In the event a person between the ages of fourteen and eighteen is charged with or pleads guilty to any crime which is not specifically enumerated as an exception to Youth Rehabilitation Act (now Juvenile Corrections Act) jurisdiction under this section (or which is not included in the exceptions to juvenile court jurisdiction found in § 20-505), the minor remains under the jurisdiction of the Youth Rehabilitation Act; however, the prose-

cutor, the minor or the district court itself may file a motion pursuant to § 20-508 seeking to waive Youth Rehabilitation Act jurisdiction. In that situation, the district court must follow the procedures set forth in § 20-508, and hold a hearing to determine whether Youth Rehabilitation Act jurisdiction should be waived. In the absence of the required motion and hearing, the minor remains under Youth Rehabilitation Act jurisdiction for disposition. *State v. Larios*, 125 Idaho 727, 874 P.2d 538 (1994).

Sentencing.

After considering defendant's age and the nature and circumstance of his crime, 25-year term of confinement was not grossly disproportionate where he killed another human being by shooting the victim four times at point-blank range without any provocation, as the utter disregard for human life demonstrated in the commission of crime, coupled with the fact that it was committed against a law enforcement officer, might well have led to imposition of the death penalty or a fixed life sentence if the perpetrator had been an adult, and under circumstances, even in view of defendant's youth, court could not say that the sentence was out of all proportion to the gravity of the offense or such as to shock the conscience of reasonable people. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Where a juvenile has been prosecuted as an adult, the appropriate time to take into account the juvenile's best interests with respect to sentencing is in deciding whether to sentence the defendant as an adult under

subsection (3) of this section or to utilize the juvenile sentencing options presented in § 20-509. *State v. Moore*, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

The issue of whether the district judge had authority under this section to enhance the defendant's sentence addressed the "legality" of the actual sentence, not the underlying conviction, and was properly brought through a motion under I.C.R. 35. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

By giving the sentencing judge the option to sentence a juvenile automatically waived into adult jurisdiction as a juvenile, the statute is premised on the assumption that adult sentencing options are not only available to the judge, but are the options with which the judge should work. *State v. Burnight*, 132 Idaho 654, 978 P.2d 214 (1999).

The district court did not abuse its discretion when it denied defendant's motion to be sentenced as a juvenile where a four-year sentence was the maximum sentence defendant could have received under the Juvenile Corrections Act, and the district court found that such a sentence was inappropriate for the crimes committed in this case. *State v. Shanahan*, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999).

Strict Construction.

The automatic waiver provision of this section, because of the legislative intent set forth in § 20-501 concerning the appropriate rehabilitation of the juvenile offender, is to be strictly construed. *State v. Larios*, 125 Idaho 727, 874 P.2d 538 (1994).

20-510. Information — Investigation — Petition. — Any peace officer, any prosecuting attorney, or any authorized representative of the board of trustees of a school district of this state, having knowledge of a juvenile who is within the purview of this act may file a petition with the court in such form as may be required by the court, except a peace officer may also issue a citation for a curfew violation pursuant to section 20-549, Idaho Code. Said individual or agency shall be responsible for providing the evidence to support the allegations made in the petition, provided this in no way shall relieve peace officers from enforcement of the law as set forth in section 31-2227, Idaho Code. The court shall make a preliminary inquiry to determine whether the interests of the public or of the juvenile require that further action be taken. Such inquiry may be made through the county probation officer or such other agent or investigation officer designated by the court. Thereupon, the court may make such informal adjustment as is practicable, or dismiss the petition, or set the matter for hearing. If an informal adjustment is made, it shall provide for full or partial restitution in the manner and form prescribed by the court when the offense involves loss or damage of property of another. A probation officer shall not file a petition unless the juvenile has previously been under the jurisdiction of the court.

The petition and all subsequent court documents shall be entitled "In the interest of ..., a juvenile under eighteen (18) years of age." The petition may be made upon information and belief but it shall be made under oath. It shall set forth plainly: (1) the facts which bring the juvenile within the purview of this act; (2) the name, age, and residence of the juvenile; (3) the names and residences of his parents and spouse, if any; (4) the name and residence of his legal guardian, if there be one, or the person or persons having custody or control of the juvenile, or of the nearest known relative if no parent or guardian can be found. If any of the facts herein required are not known by the petitioner the petition shall so state.

Service of a petition upon the parents, legal guardian or person or persons having custody or control of the juvenile shall subject the parents, legal guardian or person or persons having custody or control of the juvenile to the provisions of this chapter. The petition shall inform the parents, legal guardian or other person legally obligated to care for and support the juvenile that service of the petition upon them shall make them subject to the provisions of this chapter. [1963, ch. 319, § 7, p. 876; am. 1977, ch. 156, § 1, p. 399; am. 1989, ch. 155, § 4, p. 371; am. 1990, ch. 355, § 3, p. 958; am. and redesisg. 1995, ch. 44, § 11, p. 65; am. 2000, ch. 74, § 1, p. 157.]

Compiler's notes. This section was formerly compiled as § 16-1807 and was amended and redesignated as this section by § 11 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 2 of S.L. 1977, ch. 156 is compiled as § 20-516.

Sections 3 and 5 of S.L. 1989, ch. 155 are compiled as §§ 20-507 and former 20-520, respectively.

Sections 2 and 4 of S.L. 1990, ch. 355 are

compiled as §§ 20-505 and former 20-520, respectively.

Section 2 of S.L. 2000, ch. 74, is compiled as § 20-549.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effective on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 33-206.

Cited in: State v. Larios, 125 Idaho 727, 874 P.2d 538 (1994).

DECISIONS UNDER PRIOR LAW

Information.

Fact that information charged delinquent minors with alleged commission of felonies did not render the information bad nor deprive the court of jurisdiction. Hewlett v. Probate Court, 66 Idaho 690, 168 P.2d 77 (1946).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 66-74.

43 C.J.S., Infants, §§ 41, 42, 50, 55, 56, 196, 198, 199.

20-511. Diversion or informal disposition of the petition. —

(1) Prior to the filing of any petition under this act, the prosecuting attorney may request a preliminary inquiry from the county probation officer to determine whether the interest of the public or the juvenile requires a formal court proceeding. If court action is not required, the prosecuting attorney may utilize the diversion process and refer the case directly to the county probation officer or a community based-diversion program for informal probation and counseling. If community service is going to be utilized pursuant to this subsection, the prosecuting attorney shall collect a

fee of sixty cents (60¢) per hour for each hour of community service work the juvenile is going to perform and remit the fee to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile performing community service.

(2) After the petition has been filed and where, at the admission or denial hearing, the juvenile admits to the allegations contained in the petition, the court may decide to make an informal adjustment of the petition. Informal adjustment includes, but is not limited to:

- (a) Reprimand of the juvenile;
- (b) Informal supervision with the probation department;
- (c) Community service work;
- (d) Restitution to the victim;
- (e) Participation in a community-based diversion program.

(3) Information uniquely identifying the juvenile, the offense, and the type of program utilized shall be forwarded to the department. This information shall be maintained by the department in a statewide juvenile offender information system. Access to the information shall be controlled by the department, subject to the provisions of section 9-342, Idaho Code.

Such informal adjustment of the petition shall be conducted in the manner prescribed by the Idaho juvenile rules. When an informal adjustment is made pursuant to this section and the juvenile is to perform community service work, the court shall assess the juvenile a fee of sixty cents (60¢) per hour for each hour of community service work the juvenile is to perform. This fee shall be remitted by the court to the state insurance fund for the purpose of securing worker's compensation insurance for the juvenile performing community service. [I.C., § 16-1807A, as added by 1984, ch. 81, § 7, p. 148; am. 1994, ch. 233, § 3, p. 724; am. and redesign. 1995, ch. 44, § 12, p. 65; am. 1996, ch. 260, § 1, p. 856.]

Compiler's notes. This section was formerly compiled as § 16-1807A and was amended and redesignated as this section by § 12 of S.L. 1995, ch. 44, effective October 1, 1995.

Sections 6 and 8 of S.L. 1984, ch. 81 are compiled as §§ 20-509 and 20-516, respectively.

Section 2 of S.L. 1994, ch. 233 is compiled as former § 20-520.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in §§ 20-504, 20-525A, and 72-102.

20-512. Summons — Notice — Custody of juvenile. — After a petition shall have been filed and after such further investigation as the court may direct, and if the matter is set for hearing, the court shall issue a summons requiring the person or persons who have custody or control of the juvenile to appear personally and bring the juvenile before the court at a time and place stated; provided, however, if hearing is to be held, it shall be held not later than fifteen (15) days after the summons is issued unless the court should order on being shown cause that the time be extended. If the person so summoned shall be other than a parent or guardian of the juvenile, then the parent or guardian or both shall also be notified of the pendency of the case and of the time and place appointed for the hearing. Notice shall be given as hereinafter provided. A subpoena may be issued

requiring the appearance of any other person whose presence is required by the juvenile, his guardian or any other person who, in the opinion of the judge, is necessary. If it appears the juvenile is in such condition or surroundings that his welfare requires that he be taken into custody immediately, the judge, as provided in section 20-516, Idaho Code, may order by endorsement upon the summons that the officer serving the same shall at once take the juvenile into custody and bring him before the court. [1963, ch. 319, § 8, p. 876; am. and redesign. 1995, ch. 44, § 13, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1808 and was amended and redesignated as this section by § S.L. 1995, ch.44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Cross ref. Parents or guardians failing or refusing to place child in school, proceedings under, § 33-207.

Sec. to sec. ref. This section is referred to in § 20-508.

DECISIONS UNDER PRIOR LAW

Parties.

An order of court directing that delinquent child be sent to the State Industrial Training School is not binding on parent or guardian unless latter is made a party to the proceedings. In re Sharp, 15 Idaho 120, 96 P. 563, 18 L.R.A. (n.s.) 886 (1908).

Where parents were notified of proceeding and were present at hearing, the fact that

they were not made parties to the original proceedings would not effect the substantial rights of the parties, and would not invalidate proceedings. Hewlett v. Probate Court, 66 Idaho 690, 168 P.2d 77 (1946).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 62-81.

43 C.J.S., Infants, §§ 54, 56, 57, 202.

20-513. Service of summons — Travel expenses. — Service of summons shall be made personally by delivery of an attested copy thereof to the person summoned; provided that if the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to the last known address, or by publication thereof, or both. It shall be sufficient to confer jurisdiction if service is effected at least forty-eight (48) hours before the time fixed in the summons for the hearing. When publication is used the summons shall be published in two (2) consecutive issues of a weekly newspaper printed and published in the county; such newspaper to be designated by the court in the order for publication of the summons, and such publication shall have the same force and effect as though such person had been personally served with said summons. Service of summons, process or notice required by this act shall be made by the sheriff or a probation officer upon the request of the court and a return must be made by the sheriff on the summons showing that such service has been made. The judge may authorize payment of any necessary travel expenses incurred by any person summoned or otherwise required to appear at the hearing of any case coming within the purview of this act, and such expenses when approved by the judge shall be a charge upon the county, except that not more than five (5) witnesses on behalf of any parent or guardian may be required to attend such hearing at the expense of the county. The court may summon the appearance of any person whose presence is deemed necessary

as a witness or possible resource for the care and treatment of the juvenile, including persons whom the juvenile or the family wishes to have present. [1963, ch. 319, § 9, p. 876; am. 1976, ch. 246, § 1, p. 845; am. and redesisg. 1995, ch. 44, § 14, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1809 and was amended and redesignated as this section by § 14 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 67-76.

43 C.J.S., Infants, §§ 56, 202.

Service of process. 90 A.L.R.2d 293.

20-514. Appointment of counsel — Payment of cost of legal services. — (1) As early as possible in the proceedings, and in any event before the hearing of the petition on the merits, the juvenile and his parents, or guardian, shall be notified of their right to have counsel represent them. When it appears to the court that the juvenile or his parents or guardian desire counsel but are financially unable to pay for such legal services, the court shall appoint counsel to represent the juvenile and his parents or guardian; provided that in the event the court shall find that there is a conflict of interest between the interests of the juvenile and his parents or guardian, then the court shall appoint separate counsel for the juvenile, whether or not he or his parents or guardian are able to afford counsel, unless there is an intelligent waiver of the right of counsel by the juvenile and the court further determines that the best interest of the juvenile does not require the appointment of counsel. Counsel appointed under this section shall initially receive reasonable compensation from the county and the county shall have the right to be reimbursed for the cost thereof by the parents or guardian as hereafter provided in this section.

(2) The parents, spouse or other person liable for the support of the juvenile, or the estates of such persons, and the estate of such juvenile, shall be liable for the cost to the county of legal services rendered to the juvenile by counsel appointed pursuant to this section, unless the court finds such persons to be needy persons and financially unable to pay the cost of such legal services.

(3) The prosecuting attorney of each county may, on behalf of the county, recover payment or reimbursement, as the case may be, from each person who is liable for the payment or reimbursement of the cost of court appointed counsel for the juvenile, his parents or guardian under this section. In the event such payment or reimbursement is not made upon demand by the prosecuting attorney, suit may be brought against such persons by the prosecuting attorney within five (5) years after the date on which such counsel was appointed by the court. [I.C., § 16-1809A, as added by 1976, ch. 246, § 2, p. 845; am. and redesisg. 1995, ch. 44, § 15, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1809A and was amended and redesignated as this section by

§ 15 of S.L. 1995, ch 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Rule to sec. ref. This section is referred to in Idaho Juvenile Rules, Rule 20.

ANALYSIS

Attorney's fees.
Right to counsel.

Attorney's Fees.

If the county is required to pay reasonable fees to court-appointed private counsel, it is also required to pay reasonable fees to legal aid attorneys who are appointed by the court in Youth Rehabilitation Act (now Juvenile Corrections Act) proceedings. *James v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

Right to Counsel.

The indigent youthful offender (and his parent) and the indigent adult offender are entitled to an order of the court providing legal representation. *James v. Dunlap*, 100 Idaho 697, 604 P.2d 711 (1979).

Where the attorney has been deprived of a realistic opportunity to assist his client, the issue is not one of ineffective counsel, it is one of counsel denied. The right to counsel is so basic to our notions of fair trial and due

process that denial of the right is never treated as harmless error; such denial requires setting aside an adjudication under the Youth Rehabilitation Act (now Juvenile Corrections Act), and a remand for further proceedings in which counsel is timely provided. *Kinley v. State*, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

Where the county public defender appointed to represent the accused had only 15 minutes to speak with the accused and go over the case, and accordingly moved for a continuance in order to prepare a defense, to which the prosecutor did not object, the magistrate's denial of the continuance amounted to a denial of the right to counsel in violation of this section and I.J.R. 3 and constituted an abuse of discretion. *Kinley v. State*, 108 Idaho 862, 702 P.2d 900 (Ct. App. 1985).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, § 76.

43 C.J.S., Infants, §§ 52, 201.

Duty to advise accused as to right to assistance of counsel. 3 A.L.R.2d 1003.

Right to and appointment of counsel. 60 A.L.R.2d 691; 25 A.L.R.4th 1072.

Validity and efficacy of minor's waiver of right to counsel — Modern cases. 25 A.L.R.4th 1072.

20-515. Failure to obey summons, a contempt — Warrant. — If any person summoned as herein provided shall, without reasonable cause, fail to appear, he may be proceeded against for contempt of court. In case the summons cannot be served, or the parties served fail to obey the same, or in any case when it shall be made to appear to the judge that the service will be ineffectual, or that the welfare of the juvenile requires that he be brought forthwith into the custody of the court, a warrant or a *capias* may be issued for the parent, guardian or the juvenile. [1963, ch. 319, § 10, p. 876; am. and redesign. 1995, ch. 44, § 16, p. 65; am. 1997, ch. 76, § 2, p. 158.]

Compiler's notes. This section was formerly compiled as § 16-1810 and was amended and redesignated as this section by § 16 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 1 of S.L. 1997, ch. 76 is compiled as § 20-520.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect October 1, 1995.

Collateral References. Court's power to punish for contempt a child within the age group subject to jurisdiction of juvenile court. 77 A.L.R.2d 1004.

20-516. Apprehension and release of juveniles — Detention. — (1) A peace officer may take a juvenile into custody, or a private citizen may detain a juvenile until the juvenile can be delivered forthwith into the custody of a peace officer, without order of the court:

(a) When he has reasonable cause to believe that the juvenile has committed an act which would be a misdemeanor or felony if committed by an adult; or

(b) When in the presence of a peace officer or private citizen the juvenile has violated any local, state or federal law or municipal ordinance; or

(c) When there are reasonable grounds to believe the juvenile has committed a status offense. Status offenses are truancy, running away from or being beyond the control of parents, guardian, or legal custodian and curfew violations. Status offenders shall not be placed in any jail facility but instead may be placed in juvenile shelter care facilities, except in the case of runaways, when there is a specific detention request from a foreign jurisdiction to hold the juvenile pending transportation arrangements.

(2) A peace officer may take a juvenile into custody upon a written order or warrant signed by a judge. The judge may issue the order or warrant after finding that there is reasonable cause to believe that the juvenile comes within the purview of this chapter. Such taking into custody shall not be deemed an arrest. Jurisdiction of the court shall attach from the time the juvenile is taken into custody. When an officer takes a juvenile into custody, he shall notify the parent, guardian or custodian of the juvenile as soon as possible. Unless otherwise ordered by the court, or unless it appears to the officer taking the juvenile into custody that it is contrary to the welfare of society or the juvenile, such juvenile shall be released to the custody of his parent or other responsible adult upon written promise, signed by such person, to bring the juvenile to the court at a stated time. Such written promise shall be submitted to the court as soon as possible. If such person shall fail to produce the juvenile as agreed, or upon notice from the court, a summons for such person may be issued by the court and a warrant may be issued for apprehension of the juvenile.

(3) A juvenile taken into custody may be fingerprinted and photographed. Any fingerprints and photographs taken shall be forwarded as provided in subsection (8) of this section. If the court finds good cause it may order any fingerprints and photographs expunged.

(4) When a juvenile is not released he shall be taken forthwith to the court or place of detention specified by the court and then not later than twenty-four (24) hours, excluding Saturdays, Sundays and holidays, shall be brought before the court for a detention hearing to determine where the juvenile will be placed until the next hearing. Status offenders shall not be placed in any jail facility, but instead may be placed in juvenile shelter care facilities.

Placements may include, but are not limited to, the following:

- (a) Parents of the juvenile;
- (b) Relatives of the juvenile;
- (c) Foster care;
- (d) Group care;
- (e) A juvenile detention facility; or
- (f) Community-based diversion programs.

(5) The person in charge of a detention facility shall give immediate notice to the court that the juvenile is in his custody.

(6) No juvenile shall be held in detention longer than twenty-four (24) hours, exclusive of Saturdays, Sundays and holidays, unless a petition has been filed and the court has signed the detention order.

(7) As soon as a juvenile is detained by court order, his parents, guardian or legal custodian shall be informed by notice in writing on forms prescribed by the court that they may have a prompt hearing regarding release or detention.

(8) A juvenile taken into detention for an offense shall be fingerprinted and photographed. Fingerprints and photographs taken of juveniles shall be forwarded to the appropriate law enforcement agency and filed with the bureau of criminal identification of the Idaho state police which shall create a juvenile fingerprint file and enter the fingerprint data into the automated fingerprint identification system. The fingerprint data shall then be forwarded to the department to be maintained in a statewide juvenile offender information system. Access to the information in the juvenile offender system shall be controlled by the department, subject to the provisions of section 9-342, Idaho Code. If the court finds good cause it may order the fingerprints and photographs of the juvenile expunged.

(9) Peace officers' records of juveniles shall be kept separate from records of adults and shall be subject to disclosure according to chapter 3, title 9, Idaho Code. [1963, ch. 319, § 11, p. 876; am. 1977, ch. 156, § 2, p. 399; am. 1982, ch. 126, § 1, p. 362; am. 1984, ch. 81, § 8, p. 148; am. 1990, ch. 213, § 11, p. 480; am. and redesign. 1995, ch. 44, § 17, p. 65; am. 1995, ch. 49, § 1, p. 115; am. 1995, ch. 277, § 5, p. 925; am. 1996, ch. 259, § 1, p. 854; am. 1996, ch. 379, § 2, p. 1284; am. 2000, ch. 469, § 54, p. 1450.]

Compiler's notes. This section was formerly compiled as § 16-1811 and was amended and redesignated as this section by § 17 of S.L. 1995, ch. 44, effective October 1, 1995.

This section was amended by two 1996 acts — ch. 259, § 1 and ch. 379, § 2, both effective July 1, 1996 — which do not appear to conflict and have been compiled together.

The amendment by ch. 259, § 1, inserted the present subsection designation "(2)"; added subsection (3); redesignated former subsections (2) through (7) as present subsections (4) through (9); and in present subsection (8), in the second sentence, deleted "at a detention facility by staff of the facility" following "taken of juveniles" and substituted "juvenile fingerprint file and enter the fingerprint data into the automated fingerprint identification system" for "juvenile file, separate and apart from any adult file, in a records system", added the third sentence, and in the fourth sentence, substituted "good cause it may" for "a juvenile's detention for an offense to be unlawful, the court shall" and substituted "expunged" for "taken pursuant to that detention expunged, unless the court, after a hearing, orders otherwise".

The amendment by ch. 379, § 2, in subdivision (1)(a), inserted "misdemeanor or" preceding "felony".

Section 1 of S.L. 1977, ch. 156 is compiled as § 20-510, § 3 was repealed and § 4 is compiled as § 20-525.

Sections 7 and 9 of S.L. 1984, ch. 81 are compiled as §§ 20-511 and 20-519, respectively.

Sections 10 and 12 of S.L. 1990, ch. 213 are compiled as §§ 16-1623 and 20-525, respectively.

Sections 4 and 6 of S.L. 1995, ch. 277 are compiled as §§ 20-508 and former 20-520, respectively.

Section 1 of S.L. 1996, ch. 379 is compiled as § 33-210.

Sections 53 and 55 of S.L. 2000, ch. 469 are compiled as §§ 19-5514 and 21-112A, respectively.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

Sec. to sec. ref. This section is referred to in § 20-512.

Ineffective assistance claims.

The Uniform Post-Conviction Procedures Act, (§ 19-4901 et seq.) was available to juvenile as a procedural mechanism to challenge

the effectiveness of trial counsel; thus the appellate court declined to address this claim on direct appeal. *State v. Doe*, 136 Idaho 427, 34 P.3d 1110 (Ct. App. 2001).

Opinions of Attorney General. The Department of Health and Welfare has the authority to investigate reports of suspected child abuse, abandonment and neglect; such authority to investigate extends to school facilities; such investigation should proceed in accordance with governing statutes, the de-

partment's promulgated rules, and internal policies. OAG 93-2. (Opinion prior to creation of Department of Juvenile Corrections pursuant to S.L. 1995, ch. 44, § 4.).

Cited in: *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 62-65.

43 C.J.S., Infants, § 42.

Right of bail in proceedings in juvenile courts. 53 A.L.R.3d 848.

20-517. Detention accommodations. — (1) The county commissioners shall provide a detention facility for the detention of juveniles to be conducted by the court, or, subject to the approval of the court, by other appropriate public agency, provided that such detention shall comply with the provisions of section 20-518, Idaho Code; or within the limits of funds provided by the county commissioners the court may arrange for the use of private homes for such detention, subject to the supervision of the court or other agency, or may arrange with any institution or agency to receive for temporary care and custody juveniles within the jurisdiction of the court, provided said private individual or agency facilities, except relatives of the juvenile, shall meet the licensing requirements as provided in this chapter for care of juveniles. Nothing herein shall prevent a jail facility from being utilized as a detention facility if it complies with the provisions of section 20-518, Idaho Code.

(2) For the purpose of carrying out the provisions of this section, the county commissioners may enter into contracts or agreements with public or private agencies, individuals, other counties, or the department of juvenile corrections which may include the expenditures of moneys outside the county boundaries. If the county in which the court is located has made an agreement with another governmental unit or agency located outside the county or the judicial district for the detention of juveniles under this act, then any court in the county may order a juvenile detained outside of the county or outside of the judicial district in the detention facility described in such agreement.

(3) The county wherein any court has entered an order for the detention of a juvenile outside of the county or outside of the judicial district as provided by subsection (2) of this section shall pay all direct and indirect costs of the detention of the juvenile to the governmental unit or agency owning or operating the detention facility in which the juvenile was detained. The amount of such cost may be determined on a per day per juvenile basis by agreement between the county wherein the court entered the order of detention and the county or governmental unit or agency owning or operating such detention facility.

(4) All funds appropriated by the state for the planning and design of regional detention facilities shall be administered and distributed by the director of the department of administration for the planning and design of regional detention facilities in accordance with the requirements or directives of such appropriation. In administering such fund, the director of the department of administration shall consult with the designated county

officials of every county involved or affected by a proposed regional detention facility and shall abide by the decision of the designated representatives of each of the counties so involved or affected. [1963, ch. 319, § 12, p. 876; am. 1976, ch. 231, § 1, p. 819; am. 1978, ch. 57, § 1, p. 109; am. 1989, ch. 155, § 17, p. 371; am. and redesisg. 1995, ch. 44, § 18, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1812 and was amended and redesignated as this section by § 18 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 16 of S.L. 1989, ch. 155 is compiled as § 1-2223.

Section 3 of S.L. 1978, ch. 57 provided that the act should take effect on and after July 1, 1979.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in §§ 20-502 and 39-1202.

Responsibility for Detention Facilities.

It is the county commissioners and the court, rather than the Department of Health and Welfare, who are responsible for providing adequate juvenile facilities; thus, the Department of Health and Welfare could not be held responsible for the harm suffered by a juvenile when she was detained in the county jail pursuant to a detention order under I.J.R. 17. *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985) (decision made prior to creation of Department of Juvenile Corrections pursuant to S.L. 1995, ch. 44, § 4).

20-518. Standards for detention. — The following shall be minimum standards for the detention of juveniles provided for in section 20-517, Idaho Code:

(1) Juvenile detention facilities must be so constructed and/or maintained as to keep juveniles segregated from adult offenders or those being treated as adult offenders under section 20-508 or 20-509, Idaho Code, with there to be no contact as to sight and/or sound between the two (2) classes.

(2) Juvenile detention facilities must provide supervision and observation of juvenile detainees sufficient to protect the physical and mental health of the detainees.

(3) Juveniles held in detention must be provided with at least three (3) adequate and nutritional meals per day.

(4) Juveniles held in detention must have access to reading materials on a regular and systematic basis. Detained juveniles may receive books, newspapers and periodicals from any source including delivery to the detention facilities by family members, subject to the right of detention authorities to inspect and remove dangerous or harmful materials. Detention authorities may forbid the introduction into holding quarters of obscene books or periodicals.

(5) A visiting program shall be established in juvenile detention facilities which will allow for family visits to each juvenile for at least two (2) hours each week.

(6) Notwithstanding any other provision in this chapter, the minimum standards set forth herein shall not apply to any person who attains his or her eighteenth birthday prior to beginning or while in detention. When such person attains his or her eighteenth birthday, he or she shall be transferred from juvenile detention to the county jail. [I.C., § 16-1812A, as added by 1978, ch. 57, § 2, p. 109; am. 1984, ch. 190, § 1, p. 439; am. 1989, ch. 155, § 18, p. 371; am. and redesisg. 1995, ch. 44, § 19, p. 65; am. 2000, ch. 111, § 1, p. 248.]

Compiler's notes. This section was formerly compiled as § 16-1812A and was amended and redesignated as this section by § 19 of S.L. 1995, ch. 44, effective October 1, 1995.

Sections 19 and 20 of S.L. 1989, ch. 155 are compiled as former § 33-1002 and § 33-2009 respectively.

Section 3 of S.L. 1978, ch. 57 provided that the act should take effect on and after July 1, 1979.

Section 21 of S.L. 1989, ch. 155 provided that the act should take effect on and after January 15, 1990.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Cross ref. Distribution of obscene materi-

als to minors prohibited, §§ 18-1513 — 18-1521.

Sec. to sec. ref. This section is referred to in §§ 20-502, 20-517, 20-520 and 39-1202.

Responsibility for Detention Facilities.

It is the county commissioners and the court, rather than the Department of Health and Welfare, who are responsible for providing adequate juvenile facilities; thus, the Department of Health and Welfare could not be held responsible for the harm suffered by a juvenile when she was detained in the county jail pursuant to a detention order under I.J.R. 17. *Merritt v. State*, 108 Idaho 20, 696 P.2d 871 (1985) (decision made prior to creation of Department of Juvenile Corrections pursuant to S.L. 1995, ch. 44, § 4).

20-519. Evidentiary hearing. — If the juvenile denies the allegations in the petition, the court shall conduct a full evidentiary hearing, in the manner prescribed by the Idaho juvenile rules. The juvenile shall have the right to call witnesses on his own behalf. A record shall be made in all proceedings connected with the case and shall be preserved in the event of appeal. If at the conclusion of the evidentiary hearing the court finds the juvenile to come within the purview of the act, the court shall so rule, and then shall set the matter down for sentencing, or may, in the interest of time, hold a sentencing hearing at the conclusion of the evidentiary hearing if all information necessary to the disposition of the case is available at the time.

When a juvenile, other than the juvenile against whom the petition has been filed, is summoned as a witness in any hearing under this act, notwithstanding any other statutory provision, parents, a counselor, a friend or other person having a supportive relationship with the juvenile shall, if available, be permitted to remain in the courtroom at the witness stand with the juvenile during the juvenile's testimony unless, in written findings made and entered, the court finds that the juvenile's constitutional right to a fair trial will be unduly prejudiced. [I.C., § 16-1813, as added by 1984, ch. 81, § 9, p. 148; am. 1989, ch. 54, § 1, p. 70; am. and redesign. 1995, ch. 44, § 20, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1813 and was amended and redesignated as this section by § 20 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 8 of S.L. 1984, ch. 81 is compiled as § 20-516.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Purpose.

The sole function of the transfer hearing is to determine whether the interests of the

child and society are best served by Youth Rehabilitation Act (now Juvenile Corrections Act) proceedings or by adult proceedings, and the hearings upon which the determination is made are to be informal in nature. *State v. Christensen*, 100 Idaho 631, 603 P.2d 586 (1979).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 82-127.

43 C.J.S., Infants, §§ 46-49, 58-66, 203-205.

Evidence, applicability of rules of. 43 A.L.R.2d 1128.

Right to jury trial in juvenile court delinquency proceedings. 100 A.L.R.2d 1241.

20-520. Sentencing. — (1) Upon the entry of an order finding the juvenile is within the purview of the act, the court shall then hold a sentencing hearing in the manner prescribed by the Idaho juvenile rules to determine the sentence that will promote accountability, competency development and community protection. Prior to the entry of an order disposing of the case, other than an order of discharge or dismissal, the court may request and, if requested, shall receive a report containing the results of an inquiry into the home environment, past history, competency development, prevention or out of home placement services provided, and the social, physical and mental condition of the juvenile. The court shall not consider or review the report prior to the entry of an order of adjudication. Upon presentation and consideration of the report by the court, the court may proceed to sentence the juvenile as follows:

- (a) Place the juvenile on formal probation for a period not to exceed three (3) years from the date of the order, except the court may place a juvenile on formal probation for a period not to exceed the juvenile's twenty-first birthday if the court finds that the juvenile has committed a crime of a sexual nature;
- (b) Sentence the juvenile to detention pursuant to this act for a period not to exceed thirty (30) days for each act, omission or status which is prohibited by the federal, state, local or municipal law or ordinance by reason of minority only. The sentence shall not be executed unless the act, omission or status is in violation of section 922(x) of title 18, United States Code, or the court finds that the juvenile has violated the court's decree imposing the sentence as provided below.

If the court, after notice and hearing, finds that a juvenile has violated the court's decree imposing the sentence under circumstances that bring the violation under the valid court order exception of the Federal Juvenile Justice and Delinquency Prevention Act of 1974, as amended, the court may commit the juvenile to detention for the period of detention previously imposed at sentencing;

- (c) Commit the juvenile to a period of detention, pursuant to this act, for a period of time not to exceed ninety (90) days for each unlawful or criminal act the juvenile is found to have committed, if the unlawful or criminal act would be a misdemeanor if committed by an adult, or where the juvenile has been adjudicated as an habitual status offender;
- (d) If the juvenile has committed an unlawful or criminal act which would be a felony if committed by an adult, the court may commit the juvenile to detention for a period not to exceed one hundred eighty (180) days for each unlawful or criminal act;
- (e) Whenever a court commits a juvenile to a period of detention it shall notify the school district where the detention facility is located. No juvenile who is found to come within the purview of the act for the commission of a status offense shall be sentenced to detention in a jail facility unless an adjudication has been made that the juvenile is an habitual status offender;
- (f) Commit the juvenile to detention and suspend the sentence on specific probationary conditions;

(g) The court may suspend or restrict the juvenile's driving privileges for such periods of time as the court deems necessary, and the court may take possession of the juvenile's driver's license. The juvenile may request restricted driving privileges during a period of suspension, which the court may allow if the juvenile shows by a preponderance of evidence that driving privileges are necessary for his employment or for family health needs;

(h) The court may order that the juvenile be examined or treated by a physician, surgeon, psychiatrist or psychologist, or that he receive other special care, or that he submit to an alcohol or drug evaluation, if needed, and for such purposes may place the juvenile in a hospital or other suitable facility;

(i) In support of an order under the provisions of this section, the court may make an additional order setting forth reasonable conditions to be complied with by the parents, the juvenile, his legal guardian or custodian, or any other person who has been made a party to the proceedings, including, but not limited to, restrictions on visitation by the parents or one (1) parent, restrictions on the juvenile's associates, occupation and other activities, and requirements to be observed by the parents, guardian or custodian;

(j) The court may make any other reasonable order which is in the best interest of the juvenile or is required for the protection of the public, except that no person under the age of eighteen (18) years may be committed to jail, prison or a secure facility which does not meet the standards set forth in section 20-518, Idaho Code, unless jurisdiction over the individual is in the process of being waived or has been waived pursuant to section 20-508 or 20-509, Idaho Code. The court may combine several of the above-listed modes of disposition where they are compatible;

(k) An order under the provisions of this section for probation or placement of a juvenile with an individual or an agency may provide a schedule for review of the case by the court;

(l) Order the proceeding expanded or altered to include consideration of the cause pursuant to chapter 16, title 16, Idaho Code;

(m) Order the case and all documents and records connected therewith transferred to the magistrate division of the district court for the county where the juvenile and/or parents reside if different than the county where the juvenile was charged and found to have committed the unlawful or criminal act, for the entry of a dispositional order;

(n) Order such other terms, conditions, care or treatment as appears to the court will best serve the interests of the juvenile and the community;

(o) The court shall assess a twenty dollar (\$20.00) detention/probation training academy fee against the juvenile for every petition filed where there has been an adjudication that the juvenile is within the purview of this chapter. All moneys raised pursuant to this subsection shall be transmitted by the court for deposit in the juvenile corrections fund which is created in section 20-542, Idaho Code;

(p) Additionally, the court shall assess a fee of sixty cents (60¢) per hour of community service against the juvenile for every petition filed where

there has been an adjudication that the juvenile is within the purview of this chapter and the court is ordering community service. Such fee is to be remitted by the court to the state insurance fund for purposes of providing worker's compensation insurance for persons performing community service pursuant to this chapter;

(q) Commit the juvenile to the legal custody of the department of juvenile corrections for an indeterminate period of time not to exceed the juvenile's nineteenth birthday, unless, in the opinion of the custody review board, extended time in custody is necessary to address competency development, accountability, and community protection; provided however, that no juvenile shall remain in the custody of the department beyond the juvenile's twenty-first birthday. The department shall adopt rules implementing the custody review board and operations and procedures of such board;

(r) Notwithstanding any other provision of this section, a court may not commit a juvenile offender under the age of ten (10) years to a period of detention or to the custody of the department of juvenile corrections for placement in secure confinement.

(2) When an order is entered pursuant to this section, the juvenile shall be transported to the facility or program so designated by the court or the department, as applicable, by the sheriff of the county where the juvenile resides or is committed, or by an appointed agent. When committing a juvenile to the department, or another entity, the court shall at once forward to the department or entity a certified copy of the order of commitment.

(3) Unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order the juvenile or his parents or both to pay restitution to or make whole any victim who suffers an economic loss as a result of the juvenile's conduct in accordance with the standards and requirements of sections 19-5304 and 19-5305, Idaho Code. The amount of restitution which may be ordered by the court shall not be subject to the limitations of section 6-210, Idaho Code. Court-ordered restitution shall be paid prior to any other court-ordered payments unless the court specifically orders otherwise.

(4) The court may order the juvenile's parents, legal guardian or custodian to pay the charges imposed by community programs ordered by the court for the juvenile, or the juvenile's parents, legal guardian or custodian.

(5) Any parent, legal guardian or custodian violating any order of the court entered against the person under the provisions of this chapter shall be subject to contempt proceedings under the provisions of chapter 6, title 7, Idaho Code. [I.C., § 20-520, as added by 1996, ch. 301, § 2, p. 989; am. 1996, ch. 301, § 3, p. 989; am. 1996, ch. 359, § 2, p. 1207; am. 1997, ch. 76, § 1, p. 158; am. 1997, ch. 262, § 1, p. 746; am. 1999, ch. 155, § 1, p. 431; am. 2000, ch. 329, § 1, p. 1106; am. 2000, ch. 466, § 1, p. 1444; am. 2001, ch. 15, § 1, p. 17; am. 2002, ch. 73, § 1, p. 160; am. 2002, ch. 97, § 1, p. 265; am. 2002, ch. 309, § 1, p. 880.]

Compiler's notes. Former § 20-520, § 5, p. 296; am. 1986, ch. 76, § 1, p. 233; am. which comprised I.C., § 16-1814, as added by 1987, ch. 257, § 2, p. 522; am. 1989, ch. 155, 1984, ch. 81, § 10, p. 148; am. 1985, ch. 122, § 5, p. 371; am. 1990, ch. 355, § 4, p. 958; am.

1994, ch. 233, § 2, p. 724; am. and redesign. 1995, ch. 44, § 21, p. 65; am. 1995, ch. 45, § 1, p. 107; am. 1995, ch. 274, § 1, p. 920; am. 1995, ch. 277, § 6, p. 925, was repealed by S.L. 1996, ch. 301, § 1, effective July 1, 1996.

This section was amended by two 1997 acts — ch. 76, § 1 and ch. 262, § 1, both effective July 1, 1997 — which appear to be compatible and have been compiled together.

The amendment by ch. 76, § 1 added a new subsection (1)(b) and renumbered former subsections (1)(b)-(1)(q) as present subsections (1)(c)-(1)(r), respectively, and in new subsection (1)(m) substituted “than the” for “thanthe” following “or parents reside if different”.

The amendment by ch. 262, § 1 deleted a former subsection (f) which read “Commit the juvenile to the legal custody of the department of juvenile corrections for an indeterminate period of time not to exceed the juvenile’s twenty first birthday, unless extended jurisdiction is necessary to complete the competency development and accountability goals of the department.”; renumbered former subsections (1)(g)-(1)(p), respectively, as present subsections (1)(f)-(1)(o), respectively; added a new subsection (1)(p) and in new subsection (1)(m) substituted “than the” for “thanthe” following “or parents reside if different”.

This section was amended by two 2000 acts — ch. 329, § 1 and ch. 466, § 1, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment by ch. 329, § 1, in subdivision (1)(a), added “, except the court may place a juvenile on formal probation for a period not to exceed the juvenile’s twenty-first birthday if the court finds that the juvenile has committed a crime of a sexual nature”.

The 2000 amendment by ch. 466, § 1, in subsection (3), added the last sentence.

This section was amended by two 2002 acts — ch. 73, § 1 and ch. 97, § 1, both effective July 1, 2002, which do not conflict and have been compiled together.

The 2002 amendment by ch. 73, § 1, added subsection (4) and redesignated former subsection (4) as present subsection (5).

The 2002 amendment by ch. 97, § 1, substituted “the court may request and, if requested,” for “the court shall request and” preceding “shall receive a report containing” in subsection (1).

The Federal Juvenile Justice and Delinquency Prevention Act of 1974, referred to in subsection (1)(b) of this section, is compiled as 5 U.S.C., § 5108; 18 U.S.C., §§ 4351 to 4353, 5031 to 5042; 42 U.S.C., §§ 3701, 3723, 3733, 3758, 3772 to 3774, 3811 to 3814; 3821, 3883, 3888, 5601 to 5603, 5611 to 5619, 5631 to 5638, 5651 to 5662, 5671, 5672, 5701, 5702, 5711 to 5716, 5731, 5751.

The words “this act” refer to S.L. 1996, ch.

301 which is compiled as this section.

Sections 1 and 3 of S.L. 1996, ch. 359 are compiled as §§ 32-1301 and 20-522, respectively.

Section 2 of S.L. 1997, ch. 76 is compiled as § 20-515

Section 2 of S.L. 1999, ch. 155 is compiled as § 20-542.

Section 2 of S.L. 2001, ch. 15 is compiled as § 20-522.

Section 2 of S.L. 2002, ch. 309 is compiled as § 20-532.

Section 3 of S.L. 2002, ch. 309 provided that the act should take effect on and after January 1, 2003.

Rule to sec. ref. This section is referred to in Idaho Juvenile Rules 3, 6, 7, 10, 11, 17, 18, 19, 51 and Idaho Court Administrative Rule 32.

Sec. to sec. ref. This section is referred to in §§ 18-8403, 20-508, 20-509, 20-521, 20-523, 20-532, 20-549, 66-317, 66-318, 66-319, 66-324 and 66-338.

Cited in: State v. Broadhead, 120 Idaho 141, 814 P.2d 401 (1991); State v. Shanahan, 133 Idaho 896, 994 P.2d 1059 (Ct. App. 1999).

ANALYSIS

Best interests of defendant.

Restitution awards.

Best Interests of Defendant.

Where defendant did not contend there was any error in court’s decision to sentence him as an adult nor did the record on appeal indicate that he ever requested that the court impose sentence pursuant to the Youth Rehabilitation Act (now Juvenile Corrections Act of 1995), no error was shown with respect to the District Court’s consideration of the best interests of defendant. State v. Moore, 127 Idaho 780, 906 P.2d 150 (Ct. App. 1995).

Restitution Awards.

Because a restitution award is imposed solely as a result of misbehavior on the part of the juvenile, and is a part of the state court’s sentence in every case, except “where inappropriate or undesirable,” application of the juvenile corrections act against a parent is more a device to provide the victim with an opportunity to recover any economic loss, than a means to punish or rehabilitate the parent. Mabey v. Ellis, 224 Bankr. 786 (Bankr. D. Idaho 1998).

Where plaintiff’s damages exceeded the limits under state law for recovery from a juvenile’s parents in a civil action, the liability of the parents for payment of a restitution award did not constitute a fine, penalty, or forfeiture. Mabey v. Ellis, 224 Bankr. 786 (Bankr. D. Idaho 1998).

The court has discretion in determining the amount of the obligation owed a victim, and a

restitution order need not be considered compensation for actual pecuniary loss simply

because it matches the victim's loss. *Mabey v. Ellis*, 224 Bankr. 786 (Bankr. D. Idaho 1998).

20-521. Habitual status offender. — Any juvenile who has been adjudicated for commission of two (2) status offenses within twelve (12) months may be charged, petitioned and adjudicated as an habitual status offender for the third status offense committed within that twelve (12) month period.

The court may utilize any dispositional alternative for an habitual status offender that is detailed in section 20-520, Idaho Code, except that the juvenile shall not be placed in the Idaho juvenile corrections center. [I.C., § 16-1814A, as added by 1984, ch. 81, § 11, p. 148; am. and redesisg. 1995, ch. 44, § 22, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1814A and was amended and redesignated as this section by § 22 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this

section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 20-549.

Rule to sec. ref. This section is referred to in I.J.R., Rule 17.

20-522. Jurisdiction over parents. — Whenever a juvenile is found to come under the purview of this chapter, the court shall have jurisdiction and authority to have the juvenile and the juvenile's parent(s), legal guardian or custodian sign a probationary contract with the court containing terms and conditions that the juvenile and the juvenile's parent(s), legal guardian or custodian must adhere to as a condition of the juvenile's probation. The probationary contract may provide that upon a violation or breach of the terms and conditions of the probationary contract, the juvenile's parent(s), legal guardian or custodian shall be liable to the court for a specific monetary sum not in excess of one thousand dollars (\$1,000) for the breach of contract. All such moneys shall be payable to the court and shall be in addition to any other fines, penalties or other sanctions provided by law. Any moneys received by the court pursuant to this section shall be paid into the juvenile corrections fund created in section 20-542, Idaho Code. In lieu of or in addition to a monetary payment, the court may order that the parent(s), legal guardian or custodian attend parenting classes or undergo other treatment or counseling. Any person violating any order of the court entered under the provisions of this section shall be subject to contempt proceedings under the provisions of chapter 6, title 7, Idaho Code. [I.C., § 16-1814B, as added by 1989, ch. 155, § 6, p. 371; am. and redesisg. 1995, ch. 44, § 23, p. 65; am. 1995, ch. 277, § 7, p. 925; am. 1996, ch. 359, § 3, p. 1207; am. 2001, ch. 15, § 2, p. 17.]

Compiler's notes. This section was formerly compiled as § 16-1814B and was amended and redesignated as this section by § 23 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 5 of S.L. 1989, ch. 155 is compiled as former § 20-520.

Section 6 of S.L. 1995, ch. 277 is compiled as § 20-520.

Section 2 of S.L. 1996, ch. 359 is compiled as § 20-520.

Sections 1 and 3 of S.L. 2001, ch. 15 are compiled as §§ 20-520 and 20-542, respectively.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided

that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

Sec. to sec. ref. This section is referred to in § 20-549.

20-523. Screening teams to provide assistance to court. — In order to provide assistance to a court in making a disposition pursuant to section 20-520, Idaho Code, a screening team composed of a county probation officer or other investigation officer or agency designated by the court may meet and provide a written recommendation delineating options to the court for disposition of the case pursuant to this chapter. [I.C., § 16-1814C, as added by 1989, ch. 155, § 7, p. 371; am. and redesisg. 1995, ch. 44, § 24, p. 65; am. 1995, ch. 277, § 8, p. 925.]

Compiler's notes. This section was formerly compiled as § 16-1814C and was amended and redesignated as this section by § 24 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 9 of S.L. 1995, ch. 277 is compiled as § 20-525A.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

Rule to sec. ref. This section is referred to in Idaho Juvenile Rules, Rule 17.

20-524. Support of juvenile — Reimbursement for costs incurred. — (1) Whenever a juvenile is placed by the court in custody other than that of the juvenile's parents, guardian or custodian, after due notice to the parent, guardian or other persons legally obligated to care for and support the juvenile, and after a hearing, the court may order and decree that the parent or other legally obligated person shall pay in such a manner as the court may direct a reasonable sum that will cover in whole or in part the support and treatment of the juvenile. If the parent or other legally obligated person willfully fails or refuses to pay such sum, the court may proceed against him for contempt, or the order may be filed and shall have the effect of a civil judgment.

(2) If the juvenile is detained, the court may order that the parents or other legal guardian of the juvenile contribute to the costs of detention in an amount to be set by the court. The order may be filed and shall have the effect of a civil judgment. It is the intent of the legislature that foster parents or a parent or legal guardian receiving public assistance relating to that juvenile should not benefit from the continued receipt of payments or public assistance from any state or federal agency while the juvenile is detained. The department of health and welfare is directed to promulgate a rule implementing this intent.

(3) All child support orders shall notify the obligor that the order will be enforced by income withholding pursuant to chapter 12, title 32, Idaho Code.

(4) Failure to include these provisions does not affect the validity of the support order or decree. The court shall require that the social security numbers of both the obligor and obligee be included in the order or decree. [I.C., § 16-1815, as added by 1984, ch. 81, § 12, p. 148; am. 1986, ch. 222, § 9, p. 593; am. 1990, ch. 361, § 5, p. 973; am. 1992, ch. 194, § 1, p. 603; am. and redesisg. 1995, ch. 44, § 25, p. 65; am. 1995, ch. 354, § 1, p. 1198; am.

1997, ch. 82, § 2, p. 192; am. 1998, ch. 292, § 4, p. 928; am. 2004, ch. 50, § 3, p. 236.]

Compiler's notes. This section was formerly compiled as § 16-1815 and was amended and redesignated as this section by § 25 of S.L. 1995, ch. 44, effective October 1, 1995.

Sections 11 and 13 of S.L. 1984, ch. 81 are compiled as former § 16-1814A and former § 20-504 respectively.

Section 8 of S.L. 1986, ch. 222 is compiled as § 16-1622.

Sections 4 and 6 of S.L. 1990, ch. 361 are compiled as §§ 16-1622 and 56-203C, respectively.

Section 2 of S.L. 1992, ch. 194 contained a repeal.

Section 1 of S.L. 1997, ch. 82 is compiled as § 20-508.

Sections 3 and 5 of S.L. 1998, ch. 292 are compiled as §§ 16-1622 and 32-706, respectively.

Section 2 of S.L. 2004, ch. 50 is compiled as § 20-504.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 39-270.

20-524A. Payment of detention costs. — If the juvenile is committed to the custody of the department of juvenile corrections pursuant to chapter 5, title 20, Idaho Code, the department shall reimburse the county for the period of time in excess of five (5) calendar days during which the juvenile is housed at a detention facility. This time period shall begin to run on the first business day the department receives a copy of the order of commitment, executed by the court. Orders received by the department after 3 o'clock p.m., mountain standard time, on a business day, will be considered to have been received the next business day. Facsimile transmissions of the order are acceptable. [I.C., § 20-524A, as added by 2004, ch. 50, § 4, p. 236.]

20-525. Records — Privileged information. — (1) The court shall maintain records of all cases brought before it. In proceedings under this act the following juvenile courtroom proceedings and records shall be open to the public: all proceedings against a juvenile of the age of fourteen (14) years or older and who is petitioned or charged with an offense which would be a felony if committed by an adult including the court docket, petitions, complaints, information, arraignments, trials, sentencings, probation violation hearings and dispositions, motions and other papers filed in any case in any district; transcripts of testimony taken by the court; and findings, verdicts, judgments, orders, decrees and other papers filed in proceedings before the court of any district.

(2) Juvenile courtroom proceedings and records shall remain confidential when the court and the prosecutor agree extraordinary circumstances exist that justify records of a juvenile of the age of fourteen (14) years or older and who is petitioned or charged with an offense which would be a felony if committed by an adult should remain confidential because it is in the best interest of the juvenile.

(3) In proceedings under this act the following records and court proceedings of juveniles of the age of thirteen (13) years or younger shall not be withheld from public inspection, except on court order, which order must be made in writing in each case: the court docket, petitions, complaints, information, arraignments, trials, sentencings, probation violation hearings

and dispositions, motions and other papers filed in any case in any district; transcripts of testimony taken by the court; and findings, verdicts, judgments, orders, decrees and other papers filed in proceedings before the court of any district.

(4) These records shall be open to inspection according to chapter 3, title 9, Idaho Code. All information obtained and social records prepared in the discharge of official duty by an employee of the court shall be subject to disclosure according to chapter 3, title 9, Idaho Code.

(5) The victim of misconduct shall always be entitled to the name of the juvenile involved, the name of the juvenile's parents or guardian, and their addresses and telephone numbers, if available in the records of the court.

(6) Notwithstanding the other provisions of this act and notwithstanding any order entered pursuant hereto, nothing in this act shall prohibit the exchange of records created pursuant to this act between prosecuting attorneys or courts in this state. [1963, ch. 319, § 16, p. 876; am. 1977, ch. 156, § 4, p. 399; am. 1990, ch. 213, § 12, p. 480; 1990, ch. 245, § 2, p. 696; am. 1994, ch. 326, § 2, p. 1046; am. and redesisg. 1995, ch. 44, § 26, p. 65; am. 1997, ch. 258, § 1, p. 732.]

Compiler's notes. This section was formerly compiled as § 16-1816 and was amended and redesignated as this section by § 26 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 3 of S.L. 1977, ch. 156 was repealed.

Sections 11 and 13 of S.L. 1990, ch. 213 are compiled as §§ 20-516 and 19-1112, respectively.

Section 1 of S.L. 1990, ch. 245 is compiled as § 20-502.

Section 1 of S.L. 1994, ch. 326 is compiled as § 9-340 (now repealed).

Section 2 of S.L. 1997, ch. 258 is compiled as § 9-340 (now repealed), see Compiler's notes, § 9-340.

Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through

110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 9-340B.

Juvenile Records.

This section does not preclude access to the juvenile records and reports of an adult being sentenced on criminal charges when the defendant has become an adult. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

Collateral References. 47 Am. Jur. 2d, *Juvenile Courts*, §§ 106-117.

43 C.J.S., *Infants*, § 84.

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 A.L.R.3d 1291.

20-525A. Expungement of record — Hearing — Findings necessary — Special index — Effect of order. — (1) Any person who has been adjudicated in a case under this act and found to be within the purview of the act for having committed a felony offense or having been committed to the department of juvenile corrections may, after the expiration of five (5) years from the date of termination of the continuing jurisdiction of the court, or, in case the juvenile was committed to the juvenile corrections center, five (5) years from the date of his release from the juvenile corrections center, or after reaching age eighteen (18), whichever occurs last, petition the court for the expungement of his record. Upon the filing of the petition, the court shall set a date for a hearing and shall notify the prosecuting attorney of the pendency of the petition and of the date of the hearing. The prosecuting

attorney and any other person who may have relevant information about the petitioner may testify at the hearing.

(2) Any person who has been adjudicated in a case under this act and found to be within the purview of the act for having committed misdemeanor or status offenses only and not having been committed to the department of juvenile corrections may, after the expiration of one (1) year from the date of termination of the continuing jurisdiction of the court or after reaching age eighteen (18) years, whichever occurs later, petition the court for the expungement of his record. Upon the filing of the petition, the court shall set a date for a hearing and shall notify the prosecuting attorney of the pendency of the petition and the date of the hearing. The prosecuting attorney and any other person who may have relevant information about the petitioner may testify at the hearing.

(3) In any case where the prosecuting attorney has elected to utilize the diversion process or the court orders an informal adjustment pursuant to section 20-511, Idaho Code, the person may, after the expiration of one (1) year from the date of termination of the continuing jurisdiction of the court or after reaching age eighteen (18) years, whichever occurs later, petition the court for the expungement of his record. Upon the filing of the petition, the court shall set a date for a hearing and shall notify the prosecuting attorney of the pendency of the petition and the date of the hearing. The prosecuting attorney and any other person who may have relevant information about the petitioner may testify at the hearing.

(4) The court may not expunge a conviction for any of the following crimes from a juvenile's record:

- (a) Administering poison with intent to kill (18-4014, Idaho Code);
- (b) Aggravated battery (18-907, Idaho Code);
- (c) Armed robbery (chapter 65, title 18, Idaho Code);
- (d) Arson (chapter 8, title 18, Idaho Code);
- (e) Assault with intent to commit a serious felony (18-909, Idaho Code);
- (f) Assault with intent to murder (18-4015, Idaho Code);
- (g) Assault or battery upon certain personnel, felony (18-915, Idaho Code);
- (h) Forcible sexual penetration by use of a foreign object (18-6608, Idaho Code);
- (i) Infamous crime against nature, committed by force or violence (18-6605, Idaho Code);
- (j) Injury to child, felony (18-1501, Idaho Code);
- (k) Kidnapping (18-4501, Idaho Code);
- (l) Murder of any degree (18-4001 and 18-4003, Idaho Code);
- (m) Rape, excluding statutory rape (18-6101 and 18-6108, Idaho Code);
- (n) Ritualized abuse of a child (18-1506A, Idaho Code);
- (o) Sexual exploitation of a child (18-1507, Idaho Code);
- (p) Unlawful use of destructive device or bomb (18-3320, Idaho Code);
- (q) Voluntary manslaughter (18-4006 1., Idaho Code);
- (r) A violation of the provisions of section 37-2732(a)(1)(A), (B) or (C), Idaho Code, when the violation occurred on or within one thousand (1,000)

feet of the property of any public or private primary or secondary school, or in those portions of any building, park, stadium or other structure or grounds which were, at the time of the violation, being used for an activity sponsored by or through such a school;

(s) A violation of the provisions of section 37-2732B, Idaho Code, related to drug trafficking or manufacturing of illegal drugs.

(5) If the court finds after hearing that the petitioner has not been adjudicated as a juvenile for any of the crimes identified in subsection (2) of this section, and has not been convicted of a felony, or of a misdemeanor wherein violence toward another person was attempted or committed since the termination of the court's jurisdiction or his release from the juvenile corrections center, and that no proceeding involving such felony or misdemeanor is pending or being instituted against him, and if the court further finds to its satisfaction that the petitioner has been held accountable, is developing life skills necessary to become a contributing member of the community and that the expungement of the petitioner's record will not compromise public safety, it shall order all records in the petitioner's case in the custody of the court and all such records, including law enforcement investigatory reports and fingerprint records, in the custody of any other agency or official sealed; and shall further order all references to said adjudication, diversion or informal adjustment removed from all indices and from all other records available to the public. However, a special index of the expungement proceedings and records shall be kept by the court ordering expungement, which index shall not be available to the public and shall be revealed only upon order of a court of competent jurisdiction. Copies of the order shall be sent to each agency or official named in the order. Upon the entry of the order the proceedings in the petitioner's case shall be deemed never to have occurred and the petitioner may properly reply accordingly upon any inquiry in the matter. Inspection of the records may thereafter be permitted only by the court upon petition by the person who is the subject of the records or by any other court of competent jurisdiction, and only to persons named in the petition. [I.C., § 16-1618A, as added by 1969, ch. 299, § 1, p. 899; am. and redesign. 1995, ch. 277, § 9, p. 925; am. 1999, ch. 248, § 1, p. 636; am. 2004, ch. 160, § 1, p. 525.]

Compiler's notes. This section was formerly compiled as § 16-1816A and was amended and redesignated as this section by § 9 of S.L. 1995 ch. 277, effective October 1, 1995.

For words "this act," appearing in subsection (1), refer to S.L. 1969, Chapter 299 which is codified as this section. Generally, the reference may be to the entire Juvenile Corrections Act, codified as chapter 5 of title 20.

Section 8 of S.L. 1995, ch. 277 is compiled as § 20-523.

Section 14 of S.L. 1995, ch. 277 provided that §§ 1, 3-12 should be in full force and effect on and after October 1, 1995.

ANALYSIS

Application questionable.
Violation found.

Application Questionable.

While a home health care consultant argued that the Department of Health and Welfare violated Idaho Code § 20-525A by relying on internal records that reflected a conviction that was later expunged or sealed, it was not clear that the statute applied because it did not appear from the order that the conviction was actually expunged; nonetheless, the order was not conveyed to the Department, and it did not act unlawfully by

maintaining the conviction in the consultant's file, which action did not result in an invasion of the consultant's privacy, and the Department was properly granted summary judgment under Idaho R. Civ. P. 56(c). *Jensen v. State*, — Idaho —, 72 P.3d 897 (2003).

Violation Found.

While a license renewal form required a home health care consultant to reveal criminal convictions whether sealed, expunged, or otherwise violated § 20-525A, this violation

did not constitute an invasion of the consultant's privacy. *Jensen v. State*, — Idaho —, 72 P.3d 897 (2003).

Collateral References. 47 Am. Jur. 2d, *Juvenile Courts*, § 114.

43 C.J.S., *Infants*, § 84.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness. 63 A.L.R.3d 1112.

Expungement of juvenile court records. 71 A.L.R.3d 753.

20-526. Encouraging violations. — Any person who by any act or neglect encourages, aids or causes a juvenile to come within the purview or jurisdiction of this chapter, or who after notice that the driving privileges of the juvenile have been suspended or restricted under the provisions of this chapter knowingly permits or encourages said juvenile to operate a motor vehicle in violation of such suspension or restriction shall be guilty of a misdemeanor. The court may impose conditions upon any person found guilty under this section, and so long as such person shall comply therewith to the satisfaction of the court, the sentence imposed may be suspended. [1963, ch. 319, § 17, p. 876; am. 1977, ch. 156, § 5, p. 399; am. and redesign. 1995, ch. 44, § 27, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1817 and was amended and redesignated as this section by § 27 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that this section as amended and redesignated should be in full force and effect on October 1, 1995.

Cross ref. Punishment for misdemeanor not otherwise specified, § 18-113.

Lesser Included Offense.

The trial court did not err in failing to instruct the jury that the offense of contributing to the delinquency of a minor was a lesser included offense of the crime of lewd conduct with a minor child under sixteen, where defendant failed to request such instruction. *State v. Herr*, 97 Idaho 783, 554 P.2d 961 (1976).

DECISIONS UNDER PRIOR LAW

ANALYSIS

Information.
Misdemeanor.

Information.

It is not necessary in information brought under this section to allege specific acts performed by child nor facts constituting child a "delinquent." Information is sufficient if it appears therefrom that defendant has performed acts which encourage, cause or contribute to the delinquency of such child. *State v. Drury*, 25 Idaho 787, 139 P. 1129 (1914).

Misdemeanor.

When any person by act encourages, causes, or contributes to the delinquency of a child, he is guilty of a misdemeanor, whether such child has been declared a delinquent or not. *State v. Drury*, 25 Idaho 787, 139 P. 1129 (1914).

Collateral References. 47 Am. Jur. 2d, *Juvenile Courts*, §§ 128-139.

43 C.J.S., *Infants*, §§ 95, 100-107.

Acts in connection with marriage of infant below marriageable age as contributing to delinquency. 68 A.L.R.2d 745.

Applicability of statute against contributing to the delinquency of children of a specified age, with respect to a child who has passed the anniversary date of such age. 73 A.L.R.2d 874.

Criminal liability for contributing to delinquency of minor by sexually immoral acts as affected by fact that minor was married at time of acts charged. 84 A.L.R.2d 1254.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent. 18 A.L.R.3d 824.

Mens rea or guilty intent as necessary element of offense of contributing to delin-

quency or dependency of minor. 31 A.L.R.3d 848.

Giving, selling, or prescribing dangerous

drugs as contributing to the delinquency of a minor. 36 A.L.R.3d 1292.

20-527. School trustees to report truants. — When a juvenile of compulsory school age is expelled or is reported to have repeatedly violated the attendance regulations of the school district in which the juvenile is enrolled, pursuant to section 33-206, Idaho Code, the prosecuting attorney may file a petition under this act. The court shall cause an investigation to be made and upon receipt of the written report of the investigation, the court may proceed under this act or the child protective act with respect to the juvenile and may proceed against the juvenile's parent(s), guardian or custodian under this act pursuant to section 33-207, Idaho Code. [1963, ch. 319, § 18, p. 876; am. and redesisg. 1995, ch. 44, § 28, p. 65; am. 2002, ch. 348, § 3, p. 994.]

Compiler's notes. This section was formerly compiled as § 16-1818 and was amended and redesignated as this section by § 28 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 2 of S.L. 2002, ch. 348 is compiled as § 33-206.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Cross ref. Child protective act, §§ 16-1601 — 16-1637.

Collateral References. 43 C.J.S., Infants, §§ 34, 35, 37.

20-528. Appeals. — All orders or final judgments made by any court in matters affecting a juvenile within the purview of this act may be appealed by the juvenile or the state. A decision by the court pursuant to section 20-508, Idaho Code, not to waive jurisdiction under this act over the juvenile may be appealed by the state. Appeals shall be reviewed as provided by the appellate rules of the supreme court of Idaho, except no undertaking shall be required. Upon filing of the notice of appeal, the district court shall take jurisdiction of the case and if the juvenile is in detention shall promptly hold a hearing after the filing of a request to determine whether the juvenile shall remain in detention. [1963, ch. 319, § 19, p. 876; am. 1971, ch. 170, § 3, p. 805; am. 1980, ch. 134, § 1, p. 293; am. and redesisg. 1995, ch. 44, § 29, p. 65; am. 1997, ch. 54, § 1, p. 92.]

Compiler's notes. This section was formerly compiled as § 16-1819 and was amended and redesignated as this section by § 29 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 2 of S.L. 1980, ch. 134 declared an emergency. Approved March 24, 1980.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

ANALYSIS

Appealable orders.
Failure to appeal.

Necessity for appeal.

Order withholding judgment.

Appealable Orders.

Although this section provides that "all orders" may be appealed, a youth subject to proceedings under the youth rehabilitation act did not have the right to appeal from orders of the magistrate that he appear for hearings or that he meet with youth probation officers prior to the court's entry of a decree disposing of the proceeding, for these orders did not affect any of the child's substantial interests. In re Doe, 98 Idaho 40, 557 P.2d 634 (1976).

An order waiving juvenile jurisdiction constitutes a final order of the magistrate's divi-

sion of the district court sitting as a juvenile court. *State v. Harwood*, 98 Idaho 793, 572 P.2d 1228 (1977).

There is a right to appeal under this section from an order granting motion to suppress evidence. State's appeals are not limited to decisions not to waive jurisdiction.

Failure to Appeal.

Since this section requires an immediate appeal to a district court of a magistrate's waiver of juvenile jurisdiction over a minor, and since there are no contrary precedents under the Youth Rehabilitation Act (now Juvenile Corrections Act) upon which a defendant could have relied in making his decision not to appeal the waiver in the district court, failure by the defendant to challenge the magistrate's ruling in district court precluded consideration of that ruling in the Supreme Court. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978).

Necessity for Appeal.

The magistrate's order waiving its jurisdiction over a juvenile is a final order of the magistrate's court and must be appealed to the district court prior to further proceedings in district court in the matter. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978).

Order Withholding Judgment.

Where magistrate's order withholding judgment and placing youth on probation for a six months' period was based upon the finding that the youth had committed the criminal offense of statutory rape, the order withholding judgment was appealable, even though it was not a final disposition of the matter. In re *Doe*, 98 Idaho 40, 557 P.2d 634 (1976).

Collateral References. 47 Am. Jur. 2d, Juvenile Courts, §§ 118-127.

43 C.J.S., Infants, §§ 49, 86-91, 213.

20-529. Appointment of county probation officers. — The courts in the several counties of this state shall enter into a contract or agreement for probation services to the counties or, if the court deems local probation services are preferable, may appoint one (1) or more persons to serve as probation officers at the expense of the county with the concurrence of the county commissioners. [1963, ch. 319, § 20, p. 876; am. 1976, ch. 272, § 1, p. 920; am. and redesisg. 1995, ch. 44, § 30, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1820 and was amended and redesignated as this section by § 30 of S.L. 1995, ch. 44, effective October 1, 1995.

For words "this act" see Compiler's notes, § 20-506.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-530. Reassessment of committed juveniles — Records — Failure to reassess. — (1) The department shall make periodic reassessments of all juveniles committed to it for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. Assessments may be made as frequently as the department considers desirable and shall be made with respect to every juvenile at intervals not exceeding one (1) year. Reports of periodic reassessments made pursuant to this section shall be filed with the court from which the juvenile was committed.

(2) The department shall keep written records of assessments, prognosis, and all orders concerning disposition or treatment of every juvenile committed to it.

(3) Failure of the department to assess a committed juvenile or to reassess him within one (1) year of a previous assessment shall not of itself entitle the juvenile to discharge from the control of the department but shall entitle him to petition the committing court for an order of discharge and the court shall discharge him unless the department satisfies the court of the

need for further control. [1963, ch. 319, § 23, p. 876; am. and redesign. 1995, ch. 44, § 32, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1823 and was amended and redesignated as this section by § 32 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-531. Secure facilities. — (1) The department shall maintain and operate secure facilities for the custody of juvenile offenders who pose a danger of serious bodily harm to others or who have engaged in a pattern of serious criminal offenses, and who cannot be controlled in a less secure setting.

(2) The department shall provide or make available to juvenile offenders in secure facilities, instruction appropriate to the age, needs and range of abilities of the juveniles. An assessment shall be made of each juvenile at the secure facility to determine abilities, learning disabilities, interests, attitudes and similar matters. Training in the development of competency and life skills designed to assist the juvenile in operating effectively within and becoming a contributing member of the community shall be provided. Prevocational education shall be provided to acquaint juvenile offenders with vocations, their requirements and opportunities.

(3) The department shall place juvenile offenders committed to the department in a state or privately operated secure facility that provides humane care and developmental opportunities for the juvenile offender while promoting accountability and community protection.

(4) The department shall adopt standards, policies and procedures for the regulation and operation of secure facilities. Such standards, policies and procedures shall not be inconsistent with law. Policies shall be promulgated as rules in compliance with chapter 52, title 67, Idaho Code. [I.C., § 16-1827, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 34, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1827 and was amended and redesignated as this section by § 34 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-532. Term of commitment — Review after commitment. — A juvenile offender committed to a secure facility shall remain until the offender reaches nineteen (19) years of age, is retained for extended custody pursuant to section 20-520(1)(q), Idaho Code, or is released or discharged. A juvenile offender committed to a secure facility shall appear before the department within ninety (90) days after commitment, for review of treatment plans. [I.C., § 16-1828, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 35, p. 65; am. 2002, ch. 309, § 2, p. 880.]

Compiler's notes. This section was formerly compiled as § 16-1828 and was amended and redesignated as this section by § 35 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 1 of S.L. 2002, ch. 309 is compiled as § 20-520.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1994.

Section 3 of S.L. 2002, ch. 309 provided that the act should take effect on and after January 1, 2003.

20-532A. Order for apprehension and detention of escapees from custody. — Upon a finding by the Idaho department of juvenile corrections that a juvenile in the custody of the department has escaped from custody, a written order signed by the director or his designee shall be a sufficient order for detention for any law enforcement officer to apprehend and take into custody such person. It is hereby made the duty of all sheriffs, police, constables, parole officers, prison officials and other peace officers, to execute such order. From and after the issuance of the detention order and until taken into custody, the escapee shall be considered a fugitive from justice. Upon apprehension, the juvenile shall be detained in the closest available detention center and shall thereafter be transported by the department as soon as possible or, at the discretion of the detaining authority, the juvenile may be transported directly by that authority to the department's nearest regional facility. [I.C., § 20-532A, as added by 2000, ch. 105, § 1, p. 234; am. 2004, ch. 50, § 5, p. 236.]

Compiler's notes. Section 4 of S.L. 2004, ch. 50 is compiled as § 20-524A.

20-533. Release from custody of the department. — (1) The department shall determine an appropriate date for release of the juvenile offender from the custody of the department, based upon guidelines established by the department. The department shall review and update policy guidelines annually.

(2) Juvenile offenders may be released to their own home, to a residential community based program, to a nonresidential community based treatment program, to an approved independent living setting, or to other appropriate residences, but shall remain on probation until the probation is terminated by the court. Following the release of a juvenile offender the court may conduct a hearing to review the juvenile's conditions of probation and determine whether existing conditions should be amended or eliminated or additional conditions imposed.

(3) County probation officers shall enforce probation conditions and supervise juvenile offenders while on probation. As authorized by court order, probation officers may establish additional reasonable conditions of probation with which the juvenile offender must comply. The juvenile may move for a hearing before the court to contest any conditions imposed by the probation officer. If the probation officer establishes additional conditions of probation, the probation officer shall advise the juvenile at the time such additional conditions are imposed of the juvenile's right to move the court for a hearing to contest those conditions.

(4) When the department is considering release of a juvenile offender

committed to the department for confinement, the department shall notify the prosecuting attorney of the county from which the juvenile offender was committed to confinement, the judge whose order caused the juvenile offender to be committed to confinement and the victims of the juvenile offender's unlawful conduct. [I.C., § 16-1829, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 36, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1829 and was amended and redesignated as this section by § 36 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Rule to sec. ref. This section is referred to in Idaho Juvenile Rules, Rule 20.

20-533A. Compliance with open meeting law — Executive sessions authorized — Confidentiality of records. — (1) All meetings of the custody review board of the Idaho department of juvenile corrections shall be held in accordance with the open meeting law as provided in chapter 23, title 67, Idaho Code, provided however:

(a) Deliberations and decisions of the board concerning whether or not a juvenile shall be held in custody of the Idaho department of juvenile corrections for an extended period of time past his or her nineteenth birthday may be made in executive session; and

(b) Votes of individual members in custody decisions shall not be made public, provided that the board shall maintain a record of the votes of the individual members as required in subsection (2) of this section.

(2) A written record of the vote to retain the juvenile in custody for an extended period of time by each board member in each case reviewed by that member shall be produced by the board. Such record shall be kept confidential and privileged from disclosure, provided the record shall be made available upon request to the governor, the chairman of the senate judiciary and rules committee and the chairman of the house of representatives judiciary, rules and administration committee for all lawful purposes.

(3) A board member or employee of the Idaho department of juvenile corrections who distributes to any person not specifically listed in this section any hearing information or records that are legally required to be kept confidential shall be guilty of a misdemeanor.

(4) Nothing contained in this section shall prevent any person from obtaining the results of any action by the board or director of the Idaho department of juvenile corrections without reference to the manner in which any member voted, and the board shall make such information public unless doing so would violate public records laws.

(5) Nothing contained in this section shall prevent the director, designated staff of the director, the governor, the chairman of the senate judiciary and rules committee or the chairman of the house of representatives judiciary, rules and administration committee from attending any meeting, including any executive session, of the custody review board. [I.C., § 20-533A, as added by 2003, ch. 164, § 2, p. 462.]

Compiler's notes. Sections 1 and 3 of S.L. 2003, ch. 164, are compiled as §§ 9-340B and 67-2345, respectively.

Sec. to sec. ref. This section is referred to in § 9-340B.

20-534. Magistrate court probation sections to furnish information to department. — Probation sections of the magistrate division of the district court shall render full and complete cooperation to the department in supplying the department with all pertinent information relating to juvenile offenders committed to the department. This information may include, without limitation, prior criminal history, social history, psychological evaluations, and identifying information specified by the department. [I.C., § 16-1836, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 38, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1836 and was amended and redesignated as this section by § 38 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-535. Review of programs for juveniles — Certification. — The department shall annually review all state operated or state contracted programs which provide services to juvenile offenders and certify compliance with standards provided by the department. Written reviews shall be provided to the managers of those programs. Based upon policies established by the department, those programs which are unable or unwilling to comply with approved standards may not be certified. Any person owning or operating a private facility who willfully fails to comply with the standards established by the department shall be guilty of a misdemeanor. [I.C., § 16-1837, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 39, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1837 and was amended and redesignated as this section by § 39 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-536. Contracts with private providers of services for juvenile offenders — Certification required. — Nothing in this chapter shall prohibit the department from contracting with private providers or other entities for the provision of care, treatment and supervision of juvenile offenders committed to the custody of the department, if these programs are certified as in compliance with department standards within six (6) months after commencing operation. [I.C., § 16-1838, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 40, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1838 and was amended and redesignated as this section by § 40 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-537. Program records as property of department — Control of records. — All records maintained by providers under contract with the department to provide services to juvenile offenders are the property of the department and shall be returned to it when the juvenile offenders are terminated from the provider's programs. The department shall maintain an accurate audit trail of information provided to other programs, providers or agencies regarding juvenile offenders under its jurisdiction. [I.C., § 16-1839, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 41, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1839 and was amended and redesignated as this section by § 41 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-538. Restitution to victims of juvenile offenders — Duties of department. — (1) The department or county probation shall make reasonable efforts to ensure that restitution is made to the victim of the juvenile offender. Restitution may be made through the employment of juvenile offenders in work programs or directly to the person; provided, however, that reimbursement to the victim is conditional upon the juvenile offender's involvement in such program.

(2) Restitution may be made a condition of probation. [I.C., § 16-1840, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 42, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1840 and was amended and redesignated as this section by § 42 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 20-548.

20-539. Creation of fund. — There is hereby created in the state treasury a fund known as the "juvenile corrections victim restitution fund," which shall be administered by the department. Moneys in the fund shall consist of wage payments made to juvenile offenders in work programs, appropriations and moneys received by the department from whatever source. Moneys in the fund shall be utilized to provide full or partial restitution to victims of the juvenile offender's delinquent behavior. [I.C., § 16-1841, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 43, p. 65; am. 2001, ch. 14, § 1, p. 16.]

Compiler's notes. This section was formerly compiled as § 16-1841 and was amended and redesignated as this section by § 43 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that

the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Sec. to sec. ref. This section is referred to in § 20-539A.

20-539A. Distribution and reporting requirements for state, other public and private contract facilities. — Each facility housing juvenile offenders in department custody, whether a state, other public or private contract facility, shall comply with the following requirements for disbursement and reporting:

(1) State facilities, upon receiving any moneys credited to a juvenile in its custody, shall deposit the funds in the juvenile corrections victim restitution fund pursuant to section 20-539, Idaho Code.

(2) Other public or private contract facilities housing juveniles in department custody, upon receiving any moneys credited to or earned by a juvenile at the facility, shall directly distribute the moneys on or before the first day of each calendar quarter to the county court that committed the juvenile to department custody. Upon remitting moneys to a county on behalf of a juvenile offender, the facility shall report the direct distribution to the department for inclusion in the department's records. [I.C., § 20-539A, as added by 2001, ch. 14, § 2, p. 16.]

20-540. Reports by department. — When a juvenile offender has been committed to the department pursuant to this chapter, the department shall supply a report of the juvenile offender's educational and developmental progress to the committing court as often as the court deems necessary in its order of commitment, but not less frequently than every three (3) months. [I.C., § 16-1844, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 45, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1844 and was amended and redesignated as this section by § 45 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-541. Special commissioner — Duties. — The court shall be authorized to appoint a special commissioner to assist in the conduct of proceedings under this chapter. In any case in which the court refers a petition to the commissioner, the commissioner shall promptly cause the matter to be investigated and on the basis thereof shall either recommend dismissal of the petition or hold a hearing as provided in this act and make recommendations to the court regarding the disposition of the matter. Such commissioner shall be paid for services rendered on order of the court from county funds in such amount as is determined by the court. [I.C., § 16-1847, as added by 1989, ch. 155, § 9, p. 371; am. and redesisg. 1995, ch. 44, § 47, p. 65.]

Compiler's notes. This section was formerly compiled as § 16-1847 and was amended and redesignated as this section by § 47 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

20-542. Juvenile corrections fund — Creation. — There is hereby created in the state treasury, the juvenile corrections fund. Moneys in the

fund shall be utilized by the department for construction and administration of facilities under the jurisdiction of the department of juvenile corrections, for assistance to a county or series of counties in constructing, contracting for or administering detention facilities for juveniles, to coordinate training for juvenile detention officers and/or juvenile probation officers, and for alternative programs designed to help juveniles avoid the traditional juvenile corrections system. All moneys in the fund may be expended only pursuant to appropriation by the legislature. [I.C., § 16-1849, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 48, p. 65; am. 1999, ch. 155, § 2, p. 431; am. 2001, ch. 15, § 3, p. 17.]

Compiler's notes. This section was formerly compiled as § 16-1849 and was amended and redesignated as this section by § 48 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 65 of S.L. 1995, ch. 44 provided that the amendment and redesignation of this section should be in full force and effect on October 1, 1995.

Section 1 of S.L. 1999, ch. 155 is compiled as § 20-520.

Section 2 of S.L. 2001, ch. 15 is compiled as § 20-522.

Sec. to sec. ref. This section is referred to in §§ 20-520, 20-522.

20-543. Juvenile Corrections Center. [Repealed.]

Compiler's notes. This section, which comprised 1963, ch. 168, § 1, p. 486; am. 1974, ch. 183, § 1, p. 1480; am. 1990, ch. 367,

§ 1, p. 1004; am. and redesign. 1995, ch. 44, § 50, p. 65 was repealed by S.L. 1997, ch. 83, § 4, effective July 1, 1997.

20-544. Body politic and corporate — Powers. [Repealed.]

Compiler's notes. This section, which was formerly compiled as § 33-3502, which comprised 1963, ch. 168, § 2, p. 486; am. 1974, ch. 23, § 11, p. 633; am. 1974, § 183, § 2, p. 1480; am. 1990, ch. 367, § 2, p. 1004; amend.

and redesignated 1995, ch. 44, § 51, p. 65, effective October 1, 1995 was repealed by § 10 of S.L. 1995, ch. 277, effective October 1, 1995.

20-545. Powers of department of juvenile corrections. [Repealed.]

Compiler's notes. This section, which comprised I.C., § 33-3503, as added by 1990, ch. 367, § 3, p. 1004; am. and redesign. 1995,

ch. 44, § 52, was repealed by S.L. 1997, ch. 83, § 4, effective July 1, 1997.

20-546. Powers of director of department of juvenile corrections. [Repealed.]

Compiler's notes. This section which comprised 1963, ch. 168, § 5, p. 486; am. 1974, ch. 23, § 12, p. 633; am. 1987, ch. 223, § 1, p. 475; am. and redesign. 1995, ch. 44, § 53, p. 65;

am. 1995, ch. 277, § 11, p. 925, was repealed by S.L. 1997, ch. 83, § 4, effective July 1, 1997.

20-547. Construction of act — Citation of act — Other code references construed. — This act shall be liberally construed to the end that the legislative policy expressed herein is achieved. This act may be cited as the "Juvenile Corrections Act of 1995." On and after the effective date of this act [October 1, 1995], any citation in the Idaho Code to chapter

18, title 16, Idaho Code, shall be understood and construed as a citation to chapter 5, title 20, Idaho Code, unless the context otherwise requires. [I.C., § 16-1848, as added by 1989, ch. 155, § 9, p. 371; am. and redesign. 1995, ch. 44, § 54, p. 65; am. 1995, ch. 277, § 12, p. 925.]

Compiler's notes. This section was formerly compiled as § 16-1848 and was amended and redesignated as this section by § 54 of S.L. 1995, ch. 44, effective October 1, 1995.

Section 64 of S.L. 1995, ch. 44 declared an emergency and provided that §§ 4, 58, 59, 60, 61 and 62 should be in full force and effect on and after passage and approval. Approved March 6, 1995; section 65 provided that all the remaining sections of the act should be in

full force and effect on and after October 1, 1995.

Section 13 of S.L. 1995, ch. 277 declared an emergency and provided that § 2 of the act should be in full force and effect on and after its passage and approval. Approved March 21, 1995.

Section 14 of S.L. 1995, ch. 277 read: "All remaining sections of this act shall be in full force and effect on and after October 1, 1995."

20-548. Compensation — Amount — Crediting account of juvenile — Juveniles not employees. — Each juvenile who is engaged in productive work under the jurisdiction of the director of the department of juvenile corrections may receive for this work such compensation as the director shall determine, to be paid out of any funds available in the department of juvenile corrections competency development account. After payment of restitution pursuant to section 20-538, Idaho Code, compensation shall be credited to the account of the juvenile to be used for payment of fines, reimbursement to the department of juvenile corrections for expenses directly related to that juvenile, and upon certain circumstances, payment to the juvenile upon release from the department of juvenile corrections.

No juvenile compensated under this act shall be considered an employee of the state or the department of juvenile corrections, nor shall any juvenile come within any of the provisions of the worker's compensation law, or be entitled to any benefits thereunder whether on behalf of himself or any other person. [I.C., § 20-548, as added by 1997, ch. 265, § 1, p. 755.]

20-549. Curfew violations — Citation — Notification. — Violation by a juvenile of a curfew established by a municipal or county ordinance shall be punishable by a fine not to exceed three hundred dollars (\$300), detention, or both. Fines shall be deposited in the county juvenile justice fund of the county where the violation occurred, or if such a fund has not been established, then in the current county expense account for juvenile corrections purposes in the county where the violation occurred. The imposition of detention shall be subject to the provisions of sections 20-520(1)(b) and 20-521, Idaho Code. Detention of a juvenile in a county jail for violation of a curfew is prohibited.

Any peace officer may issue a citation for violation of a curfew that shall thereafter proceed under the juvenile corrections act in the same manner as though the violation was charged by a petition. Citations shall be issued on the Idaho uniform citation form. The peace officer issuing a curfew citation may detain the violator and at the time the citation is issued shall make a reasonable effort to obtain the endorsement of the juvenile's parent or legal

guardian on the citation. If the endorsement of a parent or legal guardian cannot be obtained with the exercise of reasonable diligence, a copy of the citation shall be hand delivered or mailed to the juvenile's parent or legal guardian by a peace officer at least seven (7) days prior to the date set for the juvenile's appearance. The citation shall provide a date certain for the appearance before a magistrate of the juvenile and parent or legal guardian.

When sentencing a juvenile for violating a curfew, the court may also enter any order authorized in section 20-520, Idaho Code. The court shall have jurisdiction over the parent or legal guardian of the violator pursuant to section 20-522, Idaho Code. [I.C., § 20-549, as added by 1998, ch. 391, § 1, p. 1196; am. 2000, ch. 74, § 2, p. 157.]

Compiler's notes. Section 1 of S.L. 2000, ch. 74 is compiled as § 20-510.

CHAPTER 6

COUNTY JAILS

SECTION.

- 20-601. County jails — By whom kept and for what use.
- 20-602. Separate rooms required.
- 20-603. Authority to designate detention officers to act as peace officers.
- 20-604. Confinement — Order of the court.
- 20-605. Costs of confinement.
- 20-606. Determining confinement costs — Decree.
- 20-607. Prisoner reimbursement to the county.
- 20-608. [Repealed.]
- 20-609. Removal of prisoners in case of pestilence.
- 20-610. Service of papers on sheriff for prisoner.
- 20-611. [Repealed.]
- 20-612. Reception and board of prisoners.
- 20-613. Security for board of civil prisoners.
- 20-614. Prisoners must be actually confined except on order of court for private employment.

SECTION.

- 20-615. Reception of federal prisoners.
- 20-616. Sheriff answerable for federal prisoners.
- 20-617. Labor of prisoners on public works.
- 20-618. Jail commissary fund.
- 20-619. Fee for medical service.
- 20-620. No prisoner exempt from labor.
- 20-621. Commutation for good behavior.
- 20-622. Inspection of jail by commissioners.
- 20-623. [Repealed.]
- 20-624. Imprisonment for fine.
- 20-625. Governor may order removal of prisoners.
- 20-626. Expenses of removal.
- 20-627. Unlawful conveyance of articles into and out of county jail.
- 20-628. Jail disciplinary action for frivolous or malicious court proceedings.

20-601. County jails — By whom kept and for what use. — The common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:

1. For the detention of persons committed in order to secure their attendance as witnesses in criminal cases.

2. For the detention of persons charged with crime and committed for trial.

3. For the confinement of persons committed for contempt, or upon civil process, or by other authority of law.

4. For the confinement of persons sentenced to imprisonment therein upon a conviction for crime.

5. Any person who is arrested and taken to a county jail shall submit to the entire booking process, to include, but not be limited to, having his or her photograph taken and his or her fingerprints recorded. Any person who refuses to submit to the entire booking process will be held in the county jail until the process is completed, or until ordered to be released by a magistrate or district judge. A person held under this section shall be taken before a magistrate at the next scheduled first appearance time, but shall not be released until either the entire booking process is completed or the judge orders the release. [1864, p. 475, § 17; R.S., R.C., & C.L., § 8525; C.S., § 9415; I.C.A., § 20-601; am. 1999, ch. 301, § 1, p. 753.]

Cross ref. Erection of jails, § 31-1001 et seq.

Refunding bonds for erection of jail, § 31-1903.

Cited in: Killeen v. Vernon, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

Collateral References. 60 Am. Jur. 2d, Penal and Correctional Institutions, § 1 et seq.

72 C.J.S., Prisons and Rights of Prisoners, § 1 et seq.

Court's power to remove jailor from office. 118 A.L.R. 174.

Failure of jailors to perform their duties as

a punishable offense. 134 A.L.R. 1256.

Sheriff's liability for negligence causing injury to prisoner. 60 A.L.R.2d 873.

Liability of prison authorities for injury to prisoner directly caused by assault by other prisoner. 41 A.L.R.3d 1021.

Right to assistance of counsel at proceedings to revoke probation. 44 A.L.R.3d 306.

Mail censorship and evidentiary use of convicted prisoners' mail. 52 A.L.R.3d 548.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner. 57 A.L.R.3d 172.

20-602. Separate rooms required. — (1) Each county jail shall house male and female prisoners separately.

(2) Each county jail shall house separately all juveniles processed as adults under Idaho Code.

(3) Each county jail shall develop an objective inmate classification system which addresses the safety of all prisoners and the security of the facility. The classification system shall be documented through the Idaho sheriffs' association jail inspection program using the minimum standards for detention facilities. [1864, p. 475, §§ 19, 20; R.S., R.C., & C.L., § 8526; C.S., § 9416; I.C.A., § 20-602; am. 1993, ch. 213, § 1, p. 578.]

Cited in: Sivak v. State, 112 Idaho 127, 730 P.2d 1047 (Ct. App. 1986).

20-603. Authority to designate detention officers to act as peace officers. — All detention officers employed by the county sheriff who receive peace officer certification from the Idaho peace officer standards and training council shall have the authority given by statute to peace officers of the state of Idaho. The county sheriff shall have the authority to designate detention officers to act as peace officers when engaged in transportation of prisoners or apprehension and arrest of prisoners who have escaped, or apprehension and arrest of persons who are suspected of having violated the terms and conditions of their probation, or arrest of a person pursuant to court order or arrest warrant. [I.C., § 20-603, as added by 2000, ch. 145, § 1, p. 374.]

Compiler's notes. Former § 20-603, § 20-603), was repealed by S.L. 1993, ch. 213, which comprised (1864, p. 475, § 20; R.S., § 2, effective July 1, 1993. R.C., & C.L., § 8527; C.S., § 9417; I.C.A.,

20-604. Confinement — Order of the court. — Any district judge or magistrate may order a person confined or detained, upon any grounds provided by law, in any county or municipal jail or other confinement facility within the judicial district in which the court is located. Such order may thereafter be amended to transfer such person from such jail or facility to another at any place within the judicial district. If the county in which the court is located has made an agreement with another governmental unit or agency located outside the judicial district for the confinement or detention of persons, then any district judge or magistrate acting in that county may also order a person confined or detained outside of the judicial district in the confinement facility or jail described in such agreement. All persons, officers and officials in charge of a jail or confinement facility shall accept a person for detention or confinement upon receiving a certified copy of an order made pursuant to this section. [I.C., § 20-604, as added by 1973, ch. 2, § 2, p. 4.]

Compiler's notes. A former section, comprising 1864, p. 475, § 22; R.S., R.C., & C.L., § 8531; C.S., § 9421; I.C.A., § 20-607, was repealed by S.L. 1973, ch. 2, § 1.

Sec. to sec. ref. This section is referred to in §§ 20-605, 20-606.

ANALYSIS

Application.
Custody.
Disciplinary violations.
Transfer of inmate.

Application.

This section and §§ 20-605 and 20-606 regulate the city's and the county's responsibility for prisoners housed in counties other than those in which the city is situated, while § 20-612 applies to prisoners housed within the county. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

Custody.

The Board of Corrections had authority to conduct disciplinary proceedings against defendant, an inmate within the Board's custody, although defendant was not under sentence at the time. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Disciplinary Violations.

Defendant failed to show that the alleged deprivation—confinement in state prison rather than county jail—caused the harm he claimed, namely, the disciplinary offense re-

ports (DOR) on his prison record. It was possible for defendant to have remained in prison during 1990 without getting any DOR's on his record. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Defendant was entitled to file for habeas corpus relief to remedy his apparently improper confinement in the state prison, in order to bring about his transfer to the correct institution, but he was not entitled to violate the prison rules without punishment. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Transfer of Inmate.

The Board of Corrections does not immediately lose "custody" over an inmate when the inmate's conviction or sentence is vacated and his case is remanded to the district court for further proceedings. During the time between vacation and transfer of the prisoner to the custody of the county sheriff, the Board of Correction must necessarily retain jurisdiction and control over the inmate until that transfer is carried out. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

Where an inmate's transfer to another prison is not properly executed, but is unreasonably delayed or simply not carried out, the inmate's remedy is to commence an administrative grievance procedure at the prison, or file a petition for habeas corpus relief. *Brennan v. State*, 122 Idaho 911, 841 P.2d 441 (Ct. App. 1992).

20-605. Costs of confinement. — The county wherein any court has entered an order pursuant to section 20-604, Idaho Code, shall pay all direct and indirect costs of the detention or confinement of the person to the

governmental unit or agency owning or operating the jail or confinement facilities in which the person was confined or detained. The amount of such direct and indirect costs shall be determined on a per day per person basis by agreement between the county wherein the court entered the order and the county or governmental unit or agency owning or operating such jail or confinement facilities. In the absence of such agreement or order fixing the cost as provided in section 20-606, Idaho Code, the charge for each person confined or detained shall be the sum of thirty-five dollars (\$35.00) per day, plus the cost of any medical or dental services paid at the unadjusted medicaid rate of reimbursement as provided in section 31-3502(4)[5], Idaho Code, unless a rate of reimbursement is otherwise established by contract or agreement; provided, however, that the county may determine whether the detained or confined person is eligible for any local, state, federal or private program that covers dental, medical and/or burial expenses. That person will be required to apply for those benefits, and any such benefits obtained may be applied to the detained or confined person's incurred expenses, and in the event of the death of such detained or confined person, the county wherein the court entered the order shall pay all actual burial costs. Release from an order pursuant to section 20-604, Idaho Code, for the purpose of a person receiving medical treatment shall not relieve the county of its obligation of paying the medical care expenses imposed in this section. In case a person confined or detained was initially arrested by a city police officer for violation of the motor vehicle laws of this state or for violation of a city ordinance, the cost of such confinement or detention shall be a charge against such city by the county wherein the order of confinement was entered. All payments under this section shall be acted upon for each calendar month by the second Monday of the month following the date of billing. [I.C., § 20-605, as added by 1973, ch. 2, § 3, p. 4; am. 1983, ch. 13, § 1, p. 48; am. 1986, ch. 115, § 1, p. 307; am. 1992, ch. 138, § 1, p. 427; am. 1994, ch. 362, § 1, p. 1135.]

Compiler's notes. A former § 20-605 which comprised, 1864, p. 475, § 22; R.S., R.C., & C.L., § 8532; C.S., § 9422; I.C.A., § 20-608 was repealed by S.L. 1973, ch. 2, § 1.

The bracketed number "5" in the third sentence was inserted by the compiler.

Section 2 of S.L. 1992, ch. 138 is compiled as § 20-612.

Section 2 of S.L. 1994, ch. 362 is compiled as § 20-612.

Sec. to sec. ref. This section is referred to in §§ 20-612, 20-614.

ANALYSIS

Application.

Compared with § 20-612.

Liability of county.

Application.

This section and §§ 20-604 and 20-606 regulate the city's and the county's responsibility for prisoners housed in counties other than

those in which the city is situated, while § 20-612 applies to prisoners housed within the county. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

Compared with § 20-612.

Since § 20-612 requires the county to pay for all necessary food, clothing and bedding, whereas this section limits the county's liability to \$20.00 per day where prisoners are confined outside the county, it is clear that these sections are not in conflict, but merely apply to different situations. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

Liability of County.

While § 50-302A makes the city liable to the county for the cost of jailing prisoners charged with or convicted of a city ordinance, and this section places liability on the city for the cost of keeping prisoners in other counties if that offending person was either initially arrested by a city police officer for violation of

a city ordinance or for violation of the state motor vehicle laws, nevertheless, under § 20-612, a city is not liable for the cost of keeping prisoners in the county jail if the prisoner has been arrested by a city police officer for violation of a state motor vehicle law. Pursuant to § 20-612, the county has the duty to pay for the incarceration of such prisoners. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

When a person is in the sheriff's custody, whether indigent or not, the sheriff and custodial county are responsible for payment of

medical expenses incurred. *St. Alphonsus Regional Medical Ctr., Ltd. v. Killeen*, 124 Idaho 197, 858 P.2d 736 (1993).

Opinions of Attorney General. Counties are responsible for the cost incurred by the county jail in housing a prisoner who has been charged with a state law violation committed within city limits and investigated by city police officers and while counties may bring legal action to recoup jail cost incurred for city prisoners charged under city ordinances or state motor vehicle laws, sheriffs cannot refuse to accept city prisoners. OAG 84-4.

20-606. Determining confinement costs — Decree. — If a district judge or magistrate orders the confinement or detention of any person under the preceding section 20-604, Idaho Code, in a jail or confinement facility in which there is no agreement as to the daily costs of confinement or detention, then any governmental unit or agency involved may apply by petition to the district court of the county in which such jail or confinement facility is located to determine the direct and indirect costs of confinement per person per day at the jail or facility. Such petition shall be filed with the district court and a copy thereof served upon the board of county commissioners or clerk thereof of the county or counties to be affected thereby, which county or counties shall be denominated as the respondent. Such respondent shall thereafter be allowed twenty (20) days to appear and plead to said petition. The determination of such costs shall be made by a district judge sitting without a jury in the same manner as other civil actions under all rules of procedure for district courts of the state of Idaho. Upon the final determination of the petition by trial or otherwise, the district court shall enter a decree binding upon all parties thereto for all persons then confined from said county or counties joined in the petition, stating the dollar amount of the confinement or detention costs per person per day which shall be paid by any such county confining or detaining persons in the jail or facility pursuant to a court order made under section 20-604, Idaho Code. Such decree shall have the force and effect of a final judgment, but the district court shall have continuing jurisdiction to vacate or modify such decree upon a material change of circumstances affecting such costs. [I.C., § 20-606, as added by 1973, ch. 2, § 4, p. 4; am 1989, ch. 231, § 1, p. 559.]

Compiler's notes. Former § 20-606 which comprised 1864, p. 475, § 23; R.S., R.C., & C.L., § 8533; C.S., § 9423; I.C.A., § 20-609 was repealed by S.L. 1973, ch. 2, § 1.

Section 5 of S.L. 1973, ch. 2 is compiled as § 31-3203.

Section 2 of S.L. 1989, ch. 231 is compiled as § 20-614.

Section 6 of S.L. 1973, ch. 2 declared an emergency. Approved January 26, 1973.

Sec. to sec. ref. This section is referred to in § 20-605.

Application.

Sections 20-604, 20-605 and this section regulate the city's and the county's responsibility for prisoners housed in counties other than those in which the city is situated, while § 20-612 applies to prisoners housed within the county. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

20-607. Prisoner reimbursement to the county. — (1) The county sheriff shall seek reimbursement for any expenses incurred by the county in relation to the charge or charges for which a person was sentenced to a county jail as follows:

(a) From each person who is or was a prisoner, not more than twenty-five dollars (\$25.00) per day for the expenses of maintaining that prisoner up to a maximum of five hundred dollars (\$500), whichever is less, for the entire period of time the person was confined in the county jail, including any period of pretrial detention;

(b) Any other expenses incurred by the county in order to collect payments under this section;

(c) In pursuing reimbursement under this section the county may investigate the financial status of the person.

(d) The county where the person was sentenced shall charge the person a daily maintenance cost according to paragraph (a) of this subsection and shall seek reimbursement once the debt has been incurred.

(2) Before seeking any reimbursement under this section, the sheriff shall develop a form to be used for determining the financial status of prisoners. The form shall provide for obtaining the age and marital status of the prisoner, the number and ages of children of the prisoner, the number and ages of other dependents, type and value of real estate, type and value of real and personal property, type and value of investments, cash, bank accounts, pensions, annuities, salary, wages and any other personal property of significant cash value. The county shall use the form when investigating the financial status of a prisoner and when seeking reimbursement.

(3)(a) A prisoner in a county jail shall provide accurate information and cooperate with the county sheriff for purposes of satisfying subsection (2) of this section.

(b) A prisoner who willfully refuses to provide accurate information or cooperate as provided in paragraph (a) of this subsection shall not receive a reduction in his or her term under section 20-621, Idaho Code.

(4) At the request of the board of county commissioners, the sheriff of the county shall forward to the board a list containing the name of each sentenced prisoner, term of sentence and date of admission.

(5)(a) Within one (1) year of the release of a person as a sentenced prisoner from any county jail, a representative for that county may file a civil action in the small claims department of the magistrate's division pursuant to the provisions of chapter 23, title 1, Idaho Code, to seek reimbursement from that person for the cost of incarceration. A civil action may be filed only after determining from the financial status form, as required in subsection (2) of this section, that sufficient assets are available to justify further recovery efforts and that further action to collect the daily expense for maintaining the sentenced person by the county will not cause the sentenced person or his dependents to qualify for public assistance.

(b) A civil action brought under this section shall be instituted in the name of the county in which the jail is located and shall state the dates and places of sentence, the length of time set forth in the sentence, the

length of time actually served, and the amount or amounts due to the county pursuant to this section.

(c) Before entering any order on behalf of the county against the defendant, the court shall take into consideration any legal obligation of the defendant to support a spouse, minor children, other dependents or provide victim restitution and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support.

(6) The reimbursements secured under this section shall be credited to the justice fund or current expense fund of the county to be available for jail maintenance and operation purposes. [I.C., § 20-607, as added by 1997, ch. 102, § 1, p. 236; am. 2003, ch. 245, § 1, p. 635.]

Compiler's notes. Former § 20-607, which comprised 1864, p. 475, § 24; R.S., R.C., & C.L., § 8534; C.S., § 9424; I.C.A., § 20-610 was repealed by S.L. 1973, ch. 2, § 1, p. 4.

Section 2 of S.L. 1997, ch. 102 is compiled as § 9-340 note (now repealed).

Section 2 of S.L. 2003, ch. 245 is compiled as § 67-2358.

Section 3 of S.L. 1997, ch. 102 provided that the act should be in full force and effect on and after October 1, 1997.

Section 3 of S.L. 2003, ch. 245 declared an emergency. Approved April 8, 2003.

Sec. to sec. ref. This section is referred to in § 9-340C.

20-608. Removal of prisoners in case of fire. [Repealed.]

Compiler's notes. This section, which comprised 1864, p. 475, § 25; R.S., R.C., &

C.L., § 8535; C.S., § 9425; I.C.A., § 20-611, was repealed by S.L. 2004 ch. 114, § 1.

20-609. Removal of prisoners in case of pestilence. — When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, a district judge may, by a written appointment, designate a safe and convenient place in the county, or the jail in a contiguous county, as the place of their confinement. The appointment must be filed in the office of the county recorder and authorize the sheriff to remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken. [1864, p. 475, § 28; R.S., R.C. & C.L., § 8537; C.S., § 9427; I.C.A., § 20-613; am. 1974, ch. 6, § 11, p. 28.]

Compiler's notes. Section 10 of S.L. 1974, ch. 6 was repealed, and § 12 is compiled as § 20-611.

20-610. Service of papers on sheriff for prisoner. — A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner with a note thereon of the time of its service. For a neglect to do so he is liable to the prisoner for all damages occasioned thereby. [1864, p. 475, § 28; R.S., R.C., & C.L., § 8537; C.S., § 9427; I.C.A., § 20-613.]

20-611. Employment of guard. [Repealed.]

Compiler's notes. This section, which comprised 1864, p. 475, § 29; R.S., R.C., & C.L., § 8538; C.S., § 9428; I.C.A., § 20-614;

am. 1974, ch. 6, § 12, p. 28, was repealed by S.L. 2004, ch. 114, § 1.

20-612. Reception and board of prisoners. — The sheriff must receive all persons committed to jail by competent authority except mentally ill persons not charged with a crime and juveniles. It shall be the duty of the board of county commissioners to furnish all persons committed to the county jail with necessary food, clothing and bedding, and medical care as provided in section 20-605, Idaho Code, and the board of county commissioners is authorized to pay therefor out of the county treasury under such rules and regulations as they may prescribe. [1864, p. 475, § 30; R.S., R.C., & C.L., § 8539; C.S., § 9429; I.C.A., § 20-615; am. 1949, ch. 150, § 1, p. 306; am. 1992, ch. 138, § 2, p. 427; am. 1994, ch. 362, § 2, p. 1135.]

Compiler's notes. Sections 1 and 3 of S.L. 1992, ch. 138 are compiled as §§ 20-605 and 20-624, respectively.

Sections 1 and 3 of S.L. 1994, ch. 362 are compiled as §§ 20-605 and 31-3302, respectively.

Cross ref. Sheriff's remuneration for care of prisoners in county jail, § 31-3203.

Sheriff to take charge of county jail and prisoners therein, § 31-2202.

Venereal diseases, duty to report, § 39-602.

Venereal diseases, examination and treatment of inmates, § 39-604.

Cited in: *Mombert v. Bannock County*, 9 Idaho 470, 75 P. 239 (1904); *Killeen v. Vernon*, 121 Idaho 94, 822 P.2d 991, 822 P.2d 991 (1991).

ANALYSIS

Application.

Compared with § 20-605.

Liability of county.

Application.

Sections 20-604, 20-605 and 20-606 regulate the city's and the county's responsibility for prisoners housed in counties other than those in which the city is situated, while this section applies to prisoners housed within the county. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

Compared with § 20-605.

Since this section requires the county to pay for all necessary food, clothing and bedding, whereas § 20-605 limits the county's liability to \$20.00 per day where prisoners are confined outside the county, it is clear that the statutes are not in conflict, but merely apply to different situations. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

Liability of County.

While § 50-302A makes the city liable to the county for the cost of jailing prisoners charged with or convicted of a city ordinance, and § 20-605 places liability on the city for the cost of keeping prisoners in other counties if that offending person was either initially arrested by a city police officer for violation of a city ordinance or for violation of the state motor vehicle laws, nevertheless, under this section, a city is not liable for the cost of keeping prisoners in the county jail if the prisoner has been arrested by a city police officer for violation of a state motor vehicle law. Pursuant to this section, the county has the duty to pay for the incarceration of such prisoners. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

When a person is in the sheriff's custody, whether indigent or not, the sheriff and custodial county are responsible for payment of medical expenses incurred. *St. Alphonsus Regional Medical Ctr., Ltd. v. Killeen*, 124 Idaho 197, 858 P.2d 736 (1993).

Opinions of Attorney General. Counties are responsible for the cost incurred by the county jail in housing a prisoner who has been charged with a state law violation committed within city limits and investigated by city police officers, and while counties may bring legal action to recoup jail costs incurred for city prisoners charged under city ordinances or state motor vehicle laws, sheriffs cannot refuse to accept city prisoners. OAG 84-4.

Collateral References. Medical or surgical services to prisoners, liability for. 44 A.L.R. 1285.

Injury to or death of prisoner through improper condition of jail, county's liability for. 46 A.L.R. 95; 50 A.L.R. 268; 61 A.L.R. 569.

Failure of jailers to perform their duties as a punishable offense. 134 A.L.R. 1256.

20-613. Security for board of civil prisoners. — Whenever a person is committed upon process in a civil action or proceeding, except when the people of this state are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or orders of court. [1864, p. 475, § 31; R.S., R.C., & C.L., § 8540; C.S., § 9430; I.C.A., § 20-616.]

Cross ref. Civil arrest, § 8-101 et seq.

Civil arrest, creditor to advance board money to jailer, § 8-212.

Contempt proceedings, defendant not to be confined unless necessary to secure his personal attendance, § 7-615.

Discharge of persons imprisoned on civil arrest, § 8-201 et seq.

Collateral References. Expense of keeping prisoner, validity and application of statutory provision for reimbursement for, to state or subdivision thereof. 139 A.L.R. 1028.

20-614. Prisoners must be actually confined except on order of court for private employment. — (1) A prisoner committed to the county jail by any court for trial or examination, or upon conviction for a public offense, must be confined in the jail until he is legally discharged unless the court specifies otherwise.

(2) If the committed person has been regularly employed, the sheriff shall, if ordered by the committing judge, arrange for a continuation of said employment insofar as possible without interruption.

(3) Whenever the prisoner is not employed, and between the hours or periods of his employment, he shall be confined in jail as an ordinary prisoner.

(4) In case of any violation of the conditions laid down for his conduct, custody and employment the prisoner shall be returned to the court, and the court may then require the balance of his or her sentence be spent in actual confinement and may cancel any earned diminution of his or her term.

(5) The sheriff shall receive such extra compensation and mileage for the administration of this act as the county commissioners determine.

(6) The court may also by its order authorize the use of a jail in a contiguous or other county where the prisoner is employed, and while the prisoner is so employed under this act such prisoner shall be in the other county's custody.

(7) The defendant may be incarcerated on nonemployment days only. If such confinement is approved, the court shall provide that the county jail shall be reimbursed the costs of confinement, in the amount provided in section 20-605, Idaho Code, by the defendant. [1864, p. 475, § 32; R.S., R.C., & C.L., § 8528; C.S., § 9418; I.C.A., § 20-604; am. 1957, ch. 237, § 1, p. 567; am. 1977, ch. 11, § 1, p. 22; am. 1987, ch. 182, § 1, p. 361; am. 1989, ch. 104, § 1, p. 237; am. 1989, ch. 231, § 2, p. 559; am. 1993, ch. 213, § 3, p. 578; am. 1994, ch. 28, § 1, p. 45; am. 2000, ch. 115, § 1, p. 254.]

Compiler's notes. Section 3 of S.L. 1989, ch. 231 contained a repeal, §§ 1 and 4 of S.L.

1989, ch. 231 are compiled as §§ 20-606 and 20-621, respectively.

Section 2 of S.L. 1993, ch. 213 contained a repeal.

Cross ref. Penalty for permitting escape, § 18-2502.

Voting not permitted by inmates, § 34-403; Const., Art. VI, § 3.

Witness, examination of prisoner as, when confined in jail, §§ 9-711 — 9-713.

Sec. to sec. ref. This section is referred to in § 19-5302.

Cited in: State v. Hughes, 102 Idaho 703, 639 P.2d 1 (1981); State v. Stringer, 126 Idaho 867, 893 P.2d 814 (Ct. App. 1995).

ANALYSIS

Intent.

Leaving visual custody.

Wilful neglect on part of sheriff.

Intent.

Since ultimate question to be determined by court is good or bad faith of sheriff in

releasing prisoners, evidence is properly admitted upon question of intent or motive. Cornell v. Mason, 46 Idaho 112, 268 P. 8 (1928).

Leaving Visual Custody.

This section must be construed in connection with §§ 20-617 — 20-620. Prisoner leaving the visual presence of his custodian is guilty of technical escape which may not develop into actual escape until aided by another who then becomes guilty of assisting in the escape. State v. Jones, 54 Idaho 782, 36 P.2d 530 (1934).

Wilful Neglect on Part of Sheriff.

Sheriff permitting prisoner to go at large out of jail except by virtue of legal order or process is guilty of wilful neglect of duty punishable under § 18-2502. Cornell v. Mason, 46 Idaho 112, 268 P. 8 (1928).

20-615. Reception of federal prisoners. — The sheriff must receive and keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this state; provision being made by the United States for the support of such prisoner. [1864, p. 475, § 31; R.S., R.C., & C.L., § 8529; C.S., § 9419; I.C.A., § 20-605.]

Sec. to sec. ref. This section is referred to in § 20-616.

20-616. Sheriff answerable for federal prisoners. — A sheriff to whose custody a prisoner is committed, as provided in the last section, is answerable for his safekeeping in the courts of the United States, according to the laws thereof. [1864, p. 475, § 42; R.S., R.C., & C.L., § 8530; C.S., § 9420; I.C.A., § 20-606.]

20-617. Labor of prisoners on public works. — Persons confined in the county jail under a judgment of conviction, suspended sentence or withheld judgment rendered in any criminal case, either under a judgment of imprisonment or a judgment for the payment of a fine and costs, may be required to perform labor on federal, state or other governmental projects. [1869, p. 90, § 1; R.S. & R.C., § 8541; am. 1915, ch. 141, p. 298, § 1; reen. C.L., § 8541; C.S., § 9431; am. 1927, ch. 74, § 1, p. 93; I.C.A., § 20-617; am. 2000, ch. 112, § 1, p. 249.]

Cited in: State v. Jones, 54 Idaho 782, 36 P.2d 530 (1934).

20-618. Jail commissary fund. — County jails which provide commissary items to inmates, and collect the costs or a portion of the costs for such

items from an inmate with sufficient funds to pay for items, are authorized to create a self-perpetuating fund to supply inmates with necessary hygiene items, recreational devices and other inmate care items and deposit the funds from the sale of items in this fund. This fund shall be subject to a yearly audit authorized by the board of county commissioners. [I.C., § 20-618, as added by 1994, ch. 29, § 1, p. 46; am. 1996, ch. 14, § 1, p. 34.]

Compiler's notes. Former §§ 20-618 and §§ 8542, 8542c; C.S., §§ 9432, 9434; I.C.A. 20-619, which comprised 1895, p. 100, § 3; §§ 20-618, 20-619, were repealed by S.L. reen. 1899, p. 253, § 3, R.S., R.C., & C.L., 1989, ch. 231, § 3.

20-619. Fee for medical service. — (1) County sheriff departments administering county jails may charge a nominal fee of five dollars (\$5.00) to any nonindigent inmate who has sufficient funds in his commissary/personal account for the purpose of seeing the jail provided doctor or nurse for a medical complaint. In the event that an inmate is indigent, such service shall be provided by the county at no cost.

(2) The county sheriff departments administering county jails may charge actual costs to any nonindigent inmate who has sufficient funds in his commissary/personal account for pharmaceuticals prescribed or authorized by jail medical staff.

(3) A "nonindigent" inmate, for purposes of this section, is an inmate who has money in his commissary/personal account normally used for the purchase of personal items for the inmate. [I.C., § 20-619, as added by 1994, ch. 213, § 1, p. 671; am. 2001, ch. 50, § 1, p. 92.]

Compiler's notes. A former § 20-619 was repealed. See Compiler's notes, § 20-618.

20-620. No prisoner exempt from labor. — No prisoner liable to employment as provided in this chapter shall be exempt therefrom except by reason of physical disability. [1895, p. 100, § 4; reen. 1899, p. 253, § 4; reen. R.C., § 8542d; compiled and reen. C.L., § 8542d; C.S., § 9435; I.C.A., § 20-620.]

Cited in: State v. Jones, 54 Idaho 782, 36 P.2d 530 (1934).

20-621. Commutation for good behavior. — Every person serving a jail sentence in a county jail in the state of Idaho who has a good record as a prisoner and who performs the tasks assigned him in an orderly and peaceable manner, shall upon the recommendation of the sheriff be allowed five (5) days off of each and every month of his sentence, by the magistrate judge. [1915, ch. 130, p. 287; reen. C.L., § 8542e; C.S., § 9436; I.C.A., § 20-621; am. 1989, ch. 231, § 4, p. 559.]

Compiler's notes. Sections 2 and 6 of S.L. 20-624, respectively, and §§ 3 and 5 contained repeals. 1989, ch. 231 are compiled as §§ 20-614 and

Sec. to sec. ref. This section is referred to in § 20-607.

Cited in: State v. Hughes, 102 Idaho 703, 639 P.2d 1 (1981); State v. Staten, 114 Idaho 925, 762 P.2d 838 (Ct. App. 1988).

Release by Sheriff.

Sheriff has no authority to release prisoners on his own motion without observing requirements of this section. Cornell v. Mason, 46 Idaho 112, 268 P. 8 (1928).

20-622. Inspection of jail by commissioners. — The county commissioners must inspect the county jail, and once every three (3) months inquire into the state thereof as respects the security thereof, treatment and condition of the prisoners, and take all necessary precaution against escape, sickness or infection. [1864, p. 596, § 2; R.S., R.C., & C.L., § 8543; C.S., § 9437; I.C.A., § 20-622.]

20-623. Jailer to return list of prisoners. [Repealed.]

Compiler's notes. This section, which comprised 1864, p. 596, § 6; R.S., R.C., &

C.L., §§ 8544; C.S., §§ 9438; I.C.A., § 20-623, was repealed by S.L. 1989, ch. 231, § 5.

20-624. Imprisonment for fine. — Whenever any defendant is confined solely for willful non-payment of any fine, the court, may, in lieu of payment, confine such person at the rate of thirty-five dollars (\$35.00) per day until the fine imposed is satisfied. [1864, p. 596, § 8; R.S., R.C., & C.L., § 8545; C.S., § 9439; I.C.A., § 20-624; am. 1957, ch. 11, § 1, p. 14; am. 1989, ch. 231, § 6, p. 559; am. 1992, ch. 138, § 3, p. 427; am. 1995, ch. 265, § 1, p. 848.]

Compiler's notes. Section 4 of S.L. 1989, ch. 231 is compiled as § 20-621 and § 5 contained a repeal.

Section 2 of S.L. 1992, ch. 138 is compiled as § 20-612.

20-625. Governor may order removal of prisoners. — Whenever, from any sufficient cause, the sheriff considers it expedient that a prisoner be removed from the jail of his county, on application in writing to the governor of the state, by the sheriff and commissioners of such county, the governor may order such prisoner to be removed to some other jail within the state, there to be detained in the same manner and by the same process as in the jail from whence he was removed, until remanded back, by a similar process, or discharged according to law. [1864, p. 596, § 9; R.S., R.C., & C.L., § 8546; C.S., § 9440; I.C.A., § 20-625.]

Sec. to sec. ref. This section is referred to in § 20-626.

20-626. Expenses of removal. — All the expense of removing and maintaining prisoners incurred under the preceding section must be defrayed by the county from which they were so removed. [1864, p. 596, § 10; R.S., R.C., & C.L., § 8547; C.S., § 9441; I.C.A., § 20-626.]

20-627. Unlawful conveyance of articles into and out of county jail. — Any person who shall deliver or attempt to deliver or shall have in his possession with the intent to deliver, any letter, article or thing, to one confined in a county jail or in any other place or building used or substituted

for a county jail, or who deposits or conceals any letter, article or thing in or about such jail or in or about such other place or building used or substituted for a county jail with the intent that one confined in such jail or such other place or building shall obtain or receive the same, without the knowledge or permission of the sheriff or a deputy sheriff; or any person who shall receive from one confined within a jail any letter, article or thing with the intent to convey the same out of the jail without the knowledge and permission of the sheriff or a deputy sheriff; or any person who shall purchase, exchange, take or receive from any prisoner while he may be working or remaining outside the county jail, any letter, article or thing without the knowledge and permission of the sheriff or a deputy sheriff, shall be guilty of a misdemeanor. [C.S., § 9441-A, as added by 1929, ch. 213, § 1, p. 433; I.C.A., § 20-627.]

Cross ref. Similar provisions concerning penitentiary, § 18-2510.

20-628. Jail disciplinary action for frivolous or malicious court proceedings. — (1) In any case, whether filed in state, federal or administrative court, in which a prisoner in a county jail submits a frivolous or malicious claim, or knowingly testifies falsely or otherwise knowingly presents false evidence or information to the court, the prisoner may be subject to jail disciplinary action. Such disciplinary action may be initiated upon the court's finding that:

- (a) The prisoner has filed a claim that is frivolous or malicious;
- (b) The prisoner filed a claim solely to harass the party;
- (c) The prisoner has knowingly testified falsely or otherwise knowingly submitted false evidence or information to the court; or
- (d) The prisoner has committed a fraud upon the court.

(2) In the absence of a finding by the court under subsection (1) of this section, and upon review and recommendation by the county prosecutor, or the attorney general, a disciplinary hearing may be held by the appropriate authority at the county jail, pursuant to chapter 6, title 20, Idaho Code, to determine whether the prisoner has filed a claim that is malicious or intended solely to harass the party, or has testified falsely or otherwise presented false evidence or information to the court.

(3) Upon a finding of guilt under either subsection (1) or (2) of this section, the prisoner shall be subject to jail disciplinary detention and loss of privileges consistent with established jail disciplinary procedures. [I.C., § 20-628, as added by 1996, ch. 420, § 4, p. 1398.]

Compiler's notes. Sections 3 and 5 of S.L. 1996, ch. 420 are compiled as §§ 20-209E and 31-3212, respectively.

CHAPTER 7

INTERSTATE CORRECTIONS COMPACT

SECTION.

20-701. Interstate Corrections Compact.

20-702. Commitment or transfer of inmates.

20-703. Enforcement of compact and effectuation of purpose.

SECTION.

20-704. Hearings.

20-705. [Repealed.]

20-701. Interstate Corrections Compact. — The Interstate Corrections Compact is hereby enacted into law and entered into by this state with any other states legally joining therein in the form substantially as follows:

INTERSTATE CORRECTIONS COMPACT

ARTICLE I — PURPOSE AND POLICY

The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

ARTICLE II — DEFINITIONS

As used in this compact, unless the context clearly requires otherwise:

(a) "State" means a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" means a state party to this compact in which conviction or court commitment was had.

(c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had.

(d) "Inmate" means a male or female offender who is committed, under sentence to, or confined in a penal or correctional institution.

(e) "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates as defined in (d) above may lawfully be confined.

ARTICLE III — CONTRACTS

(a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

1. Its duration.
 2. Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.
 3. Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.
 4. Delivery and retaking of inmates.
 5. Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.
- (b) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

ARTICLE IV — PROCEDURES AND RIGHTS

(a) Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III of this act.

(d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in

the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials at the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

ARTICLE V — ACTS NOT REVIEWABLE IN RECEIVING STATE: EXTRADITION

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the

inmate is formally accused of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

ARTICLE VI — FEDERAL AID

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

ARTICLE VII — ENTRY INTO FORCE

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two (2) states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.

ARTICLE VIII — WITHDRAWAL AND TERMINATION

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until one (1) year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

ARTICLE IX — OTHER ARRANGEMENTS UNAFFECTED

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have

with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

All contracts made pursuant to section 20-705, Idaho Code, prior to the effective date [July 1, 1974] of this act are hereby ratified according to their terms and conditions for the life of such contracts.

ARTICLE X — CONSTRUCTION AND SEVERABILITY

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

ARTICLE XI — POWERS

The board of correction is hereby authorized and directed to do all things necessary or incidental to the carrying out of the compact in every particular and may in its discretion delegate this authority to the director of corrections; provided, however, that any contract on behalf of this state to implement the participation of this state in this compact shall not be of any force or effect until approved by the board of examiners. [I.C., § 20-701, as added by 1974, ch. 249, § 2, p. 1638.]

Compiler's notes. Former § 20-701 which comprised 1959, ch. 56, § 1, p. 117 was repealed by S.L. 1974, ch. 249, § 1 and the present section substituted therefor.

Section 20-705 referred to in the second paragraph of Article IX was repealed.

Comp. leg. Mont. Rev. Codes Ann. §§ 46-19-401, 46-19-402.

Nev. Rev. Stat. §§ 215A.010 — 215A.060.

Utah Code Ann. §§ 77-28a-1 — 77-28a-5.

Sec. to sec. ref. This section is referred to in §§ 20-703, 20-704.

Cited in: Chapa v. State, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

20-702. Commitment or transfer of inmates. — Any court or other agency or officer of this state having power to commit or transfer an inmate (as defined in Article II(d) of the Interstate Corrections Compact) to any institution for confinement may commit or transfer such inmate to any institution within or without this state if this state has entered into a contract or contracts for the confinement of inmates in said institution pursuant to Article III of the Interstate Corrections Compact. [1959, ch. 56, § 2, p. 117; am. 1974, ch. 249, § 3, p. 1638.]

Compiler's notes. The words enclosed in parentheses so appeared in the law as enacted.

Section 4 of S.L. 1974, ch. 249 is compiled as § 20-704.

20-703. Enforcement of compact and effectuation of purpose. — The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purpose and intent which may be within their respective jurisdictions including but not limited to the making and submission of such reports as are required by the compact. [1959, ch. 56, § 3, p. 117.]

ANALYSIS

Bench warrant.
Purpose.

Bench Warrant.

The court's issuance of the bench warrant was within its jurisdiction under the Interstate Corrections Compact, as an integral part of the extradition process, rather than under the court's previously exercised sentencing power. *Chapa v. State*, 115 Idaho 439,

767 P.2d 282 (Ct. App. 1989).

Purpose.

When the Idaho Legislature approved this compact, the Legislature also imposed a special duty on the courts to "enforce this compact and do all things appropriate to the effectuation of its purpose and intent;" this statutory duty carried with it the power to issue a bench warrant for fugitives. *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

20-704. Hearings. — The board of correction, the state board of health and welfare and/or such other agency or officer designated for such purpose by the governor, are hereby authorized and directed to hold such hearings within or without the state of Idaho as may be requested by any other party state pursuant to Article IV(f) of the Interstate Corrections Compact. [1959, ch. 56, § 4, p. 117; am. 1974, ch. 249, § 4, p. 1638.]

Compiler's notes. This section was amended twice in 1974 by § 13 of ch. 6, effective July 1, 1974, approved February 14, 1974 and § 4 of ch. 249, effective July 1, 1974, approved April 2, 1974. Since § 4 of ch. 249 was the last expression of the legislature it has been set out above as the section. Section 13 of ch. 6 changed the name of the state board of health to the state board of health and welfare. This change has been made in the above section by the code commission on the authority of S.L. 1974, ch. 286, § 1 and S.L. 1974, ch. 23, § 47 (§ 39-103).

Section 12 of S.L. 1974, ch. 6 is compiled as § 20-611.

Section 6 of S.L. 1959, ch. 56 read: "The provisions of this act shall be severable and if any phrase, clause, sentence or provision of

this act is declared to be unconstitutional or the applicability thereof to any state, agency, person or circumstance is held invalid, the constitutionality of this act and the applicability thereof to any other state, agency, person or circumstance shall, with respect to all severable matters, not be affected thereby. It is the legislative intent that the provisions of this act be reasonably and liberally construed."

Section 7 of S.L. 1959, ch. 56 provided such act should be in full force and effect from and after July 1, 1959.

Section 14 of S.L. 1974, ch. 6 provided the act should be in full force and effect on and after July 1, 1974.

Cited in: *Chapa v. State*, 115 Idaho 439, 767 P.2d 282 (Ct. App. 1989).

20-705. Governor authorized to enter into contracts. [Repealed.]

Compiler's notes. This section which comprised S.L. 1959, ch. 56, § 5 was repealed by S.L. 1974, ch. 249, § 1.

CHAPTER 8

PRIVATE PRISON FACILITIES

SECTION.

20-801. Definitions.

20-802. Application of chapter.

20-803. Private prison contractors — Contract or approval required to construct and operate private prison facilities and to house out-of-state prisoners.

20-804. Authority of county or city to house prisoners in a private prison facility.

20-805. Contracts with a private prison contractor.

SECTION.

20-806. Private prison facilities — Requirements — Licensing.

20-807. Out-of-state prisoners.

20-808. Monitoring private prisons.

20-809. Riot, rebellion, escape, crime or emergency situation — Notice — Reimbursement for costs.

20-810, 20-811. [Repealed.]

20-812. Enforcement — Available remedies — Civil penalty.

20-801. Definitions. — In this chapter:

(1) "Contracting authority" means a board of county commissioners or the governing body of a city.

(2) "Correctional facility" means a facility for the confinement of prisoners. The term shall be construed to include references to terms including, but not limited to, "prison," "state prison," "state penitentiary," "governmental detention facility," "penal institution (facility)," "correctional institution," "detention institution (facility)," "county jail," "jail," "private prison (facility)" or "private correctional facility." The term does not include a treatment facility designed to evaluate and treat substance abuse when the treatment facility is operated under the direction of a political subdivision of the state of Idaho.

(3) "Governmental entity" means a state, county, city, municipal corporation or other political subdivision of the state, or a territory of the United States and any political subdivision thereof.

(4) "In-state prisoner" means a person who has been convicted of a crime in the state of Idaho and is either incarcerated or on parole for that crime or in custody for trial and sentencing, and who is being housed in any state, local or private correctional facility, or who is being transported in any manner within or through the state of Idaho.

(5) "Local correctional facility" means a facility for the confinement of prisoners operated by or under the control of a county or city. The term shall include references to "county jail," or "jail." The term shall also include a private correctional facility housing prisoners under the custody of the state board of correction, the county sheriff or other local law enforcement agency.

(6) "Medium security" or "medium custody" means a security or custody classification reserved for prisoners who have demonstrated an ability to follow institutional rules and regulations, who may have a considerable amount of time remaining to serve and who may present an escape risk at a lower assigned custody level.

(7) "Minimum security" or "minimum custody" means a security or custody classification reserved for prisoners who have continuously demonstrated an ability to follow institutional rules and regulations; who are either committed for a nonviolent crime or are committed on a violent crime;

who are generally within twelve (12) months of parole eligibility; and who normally do not present an escape risk.

(8) "Out-of-state prisoner" or "out-of-state inmate" means a person who is convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility in the state of Idaho, or who is being transported in any manner within or through the state of Idaho.

(9) "Prisoner" means a person who has been convicted of a crime in the state of Idaho and is either incarcerated or on parole for that crime or in custody for trial and sentencing, or who is convicted of and sentenced for a crime in a state other than the state of Idaho, or under the laws of the United States or other foreign jurisdiction, and who is being housed in any state, local or private correctional facility, or who is being transported in any manner within or through the state of Idaho. The term shall be construed to include references to terms including, but not limited to, "inmate," "convict," "detainee," and other similar terms, and shall include "out-of-state prisoner" and "out-of-state inmate."

(10) "Private prison contractor" means any person, organization, partnership, joint venture, corporation or other business entity engaged in the site selection, design, design/building, acquisition, construction, construction/management, financing, maintenance, leasing, leasing/purchasing, management or operation of private prison facilities or any combination of these services. For purposes of this chapter, "private prison contractor" does not include those persons, organizations, partnerships, joint ventures, corporations or other business entities that contract with a political subdivision of the state of Idaho for the construction of a facility provided the facility will be operated by the political subdivision or where the facility is operated under the direction of the political subdivision and is designed to evaluate and treat substance abuse.

(11) "Private prison facility" or "private correctional facility," for purposes of this chapter, means a correctional facility constructed or operated in the state of Idaho by a private prison contractor pursuant to contract with a contracting authority as defined herein. [I.C., § 20-801, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 1, p. 1177.]

Compiler's notes. Section 2 of S.L. 2001, ch. 335 is compiled as § 20-803.

20-802. Application of chapter. — The provisions of this chapter shall not apply to contracts of the state of Idaho for the housing of inmates in a private prison facility or local government detention facility. [I.C., § 20-802, as added by 1998, ch. 360, § 1, p. 1123.]

20-803. Private prison contractors — Contract or approval required to construct and operate private prison facilities and to house out-of-state prisoners. — (1) A private prison contractor may not construct or operate a private prison facility in this state except pursuant to a contract with the state of Idaho, as authorized in chapter 2, title 20, Idaho

Code, or pursuant to a written contract with a county or city of this state, as authorized by the provisions of this chapter.

(2) A private prison contractor may not house in a private prison facility in this state prisoners who have been convicted of offenses committed against the laws of a governmental entity other than the state of Idaho and its political subdivisions except pursuant to a written contract with the board of county commissioners of the county in which the facility is located or the governing body of the city in which the facility is located, and only if the requirements of this chapter are met. [I.C., § 20-803, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 2, p. 1177.]

Compiler's notes. Section 1 of S.L. 2001, ch. 335 is compiled as § 20-801.

20-804. Authority of county or city to house prisoners in a private prison facility. — (1) A board of county commissioners or the governing body of a city may authorize the housing of specific minimum to medium security prisoners of the county or the city in a private prison facility pursuant to contract with the private prison contractor and subject to the review and approval of the prisoners by the department of correction. Provided, however, that in no event shall a board of county commissioners or the governing body of a city authorize, nor shall the department of correction approve, housing of any maximum or close custody prisoners, inmates imprisoned for sexual offenses or prisoners with a history or record of institutional violence involving the use of a deadly weapon, a history or record of committing any act of an assaultive nature that would qualify as a felony under the laws of the state of Idaho against any prisoner, employee or visitor while confined, or a history or record of escape or attempted escape from secure custody.

(2) A board of county commissioners may not contract with a private prison contractor in which a commissioner or an elected or appointed peace officer or other county official has an interest pursuant to chapter 2, title 59, Idaho Code. The governing body of a city may not contract with a private prison contractor in which the mayor, a member of the city council, or any appointed peace officer or other city official has an interest pursuant to chapter 2, title 59, Idaho Code. A contract made in violation of the provisions of this subsection is voidable. [I.C., § 20-804, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 3, p. 1177.]

20-805. Contracts with a private prison contractor. — (1) A board of county commissioners or the governing body of a city, may enter into a contract with a private prison contractor for the site selection, design, design/building, acquisition, construction, construction/management, financing, maintenance, leasing, leasing/purchasing, management or operation of private prison facilities or any combination of these services, subject to the following requirements and limitations:

(a) Any request for proposals, any original contract, any contract renewal, any price or cost adjustment or any other amendment to any contract for the incarceration of individuals in a private prison facility

shall be reviewed and approved by the contracting authority. The contract shall be in a form as provided for by the department of administration in consultation with the department of correction;

(b) No contract authorized by the provisions of this section shall be awarded until the private prison contractor demonstrates to the satisfaction of the contracting authority that the contractor possesses the necessary qualifications and experience to provide the services specified in the contract; that the contractor can provide the necessary qualified personnel to implement the terms of the contract; that the financial condition of the contractor is such that the terms of the contract can be fulfilled; that the contractor has the ability to comply with applicable court orders and meet corrections standards; and that the proposed private prison facilities or the correctional services proposed by the contractor meet constitutional minimums;

(c) The contract shall provide for the assumption of liability by the private prison contractor for all claims arising from the services performed under the contract by the private prison contractor;

(d) No contract authorized by the provisions of this section shall be awarded until the private prison contractor provides a policy of insurance for all claims satisfactory to the contracting authority specifically including, but not limited to, insurance for civil rights claims as determined by a risk management or actuarial firm with demonstrated experience in public liability for state governments. The insurance policy shall provide coverage for the private prison contractor and its officers, guards, employees and agents as well as insure the state, including all state agencies, and all political subdivisions of the state with jurisdiction over the facility or in which a facility is located against all claims arising from the services performed under the contract by the private prison contractor, its officers, guards, employees and agents. The private prison contractor shall immediately provide written notification of cancellation of insurance to the state department of correction and the contracting authority. The private prison contractor may not self-insure. Proof of insurance shall be provided on or before January 1 of every year to the state department of correction and the contracting authority;

(e) If the contract includes construction or renovation, the contract shall require a performance bond approved by the contracting authority that is adequate and appropriate for the proposed construction or renovation contract;

(f) Except as otherwise permitted under the constitution or laws of the state of Idaho, no contract awarded pursuant to this section shall provide for the encumbrance of funds beyond the amount available for a fiscal year;

(g) The contract shall require the private prison contractor to be licensed by the department of correction pursuant to the provisions of this chapter.

(2) Any contract between a contracting authority and a private prison contractor, whereby the contractor provides for the housing, care, and control of prisoners in a facility operated by the contractor, shall contain, in addition to other provisions, terms and conditions:

- (a) A requirement that the private prison contractor provide the services in a facility which meets correctional standards satisfying constitutional minimums, state and federal laws, rules and regulations and applicable court orders, including, but not limited to, all sanitation, food service, safety and health regulations;
- (b) A requirement that the private prison contractor send copies of reports of inspections completed by appropriate authorities regarding compliance with laws, rules and regulations of the type described in subsection (2)(a) of this section to the governing authority of the local public entity in which the correctional facility is located;
- (c) If a private prison contractor enters into a contract with a board of county commissioners for a private prison facility to be located on private land within the limits of any city, it shall be required that the contractor obtain written authorization from the governing body of the city in which the facility is to be located;
- (d) A requirement that the private prison contractor provide training to its personnel to a level acceptable to the contracting authority. The provisions of this section shall not be construed to confer peace officer status upon any employee of the private prison contractor or to authorize the use of firearms. A private correctional officer or other designated employee of a private prison contractor may carry and use firearms in the course of the officer's or employee's employment only if the officer or employee is certified as having satisfactorily completed a training program approved by the department of correction and only if used to prevent escape from the facility or from custody while being transported to or from the facility or to prevent an act which would cause death or serious bodily injury to any person. The provisions of this section shall not be construed to confer county or city employee status upon any employee of the private prison contractor;
- (e) A requirement that the private prison contractor will not employ any person at the private prison facility until after the private contractor has submitted to the bureau of criminal identification, on a form prescribed by the bureau, a request that the bureau conduct a criminal records check of the person and a requirement that the private prison contractor will not employ any person at the facility if the records check or other information possessed by the contractor indicates that the person has a criminal history or record, regardless of the form of judgment;
- (f) A requirement that the private prison facility be staffed at all times to ensure supervision of prisoners and maintenance of security within the private prison facility and to provide for appropriate programs, transportation, security and other operational needs. In determining security needs for the private prison facility, the private contractor and the contract requirements shall fully take into account all relevant factors including, but not limited to, the proximity of the facility to neighborhoods and schools;
- (g) A requirement that the private prison contractor, its officers, guards, employees, and agents immediately notify the county sheriff and any other law enforcement or other governmental entities, agencies or per-

sonnel named in the contract or required to be informed as provided in this chapter of any riot, rebellion, escape, crime or other emergency situation occurring inside or outside the facility, and a requirement that the private prison contractor reimburse costs as provided in section 20-809, Idaho Code. Notification shall be made by telephone and in writing. The written notice may be made by facsimile transmission or mail;

(h) A requirement that the private contractor adopt and use in the private prison facility a drug testing and treatment program that meets the standards of any drug testing and treatment program the department of correction uses for its prisoners in state correctional institutions;

(i) A requirement that the private prison contractor provide advance written notice to the county sheriff of the contracting authority and any other law enforcement or other governmental entities, agencies or personnel named in the contract, of its intent to provide for transport of any prisoners to or from the private prison facility and of the intended destination;

(j) A requirement that the private prison contractor shall be solely responsible for any damage caused by a prisoner in its custody and shall be solely responsible for security and all costs associated with transporting and housing prisoners to and from locations outside the private prison facility including, but not limited to, court, medical and sending facility locations. The private prison contractor's responsibility for costs will include, but not be limited to, all costs which may be required by court officials for additional security for the prisoner provided by federal, state, county or city officials;

(k) A requirement that no prisoner shall be housed in a private prison facility pursuant to this chapter without the prior approval of the department of correction pursuant to the provisions of this chapter. Prior to housing any proposed prisoner in the private prison facility, all records in the possession of, or available to, the sending entity, including, but not limited to, classification, medical information, conduct and confinement history of the prisoner shall be provided to the department of correction for review and the department shall have the authority to approve or reject housing of the prisoner based on standards as set forth pursuant to this chapter. Provided however, that in lieu of providing the department of correction with medical information of a prisoner, a sending entity may elect to certify, by a physician licensed in this state and employed by, or under contract with, the private prison facility, that the prisoner under consideration for placement in the facility has been tested, and has not tested positive, for the presence of HIV antibodies or antigens, hepatitis B virus, hepatitis C virus and tuberculosis;

(l) A requirement that the private prison contractor, prior to housing any out-of-state prisoner in the private prison facility under the contract, enter into an agreement with the local contracting governmental entity that sets forth a conversion plan that will be followed if, for any reason, the facility is closed or ceases to operate. The conversion plan shall provide, in part, that the private prison contractor shall be responsible for

housing and providing for the transportation of the prisoners who are in the facility at the time it is closed or ceases to operate and for the cost of such housing and transporting of those prisoners;

(m) A requirement that the private prison contractor conform to applicable standards, and obtain accreditation from, the American correctional association and the national commission on correction health care;

(n) A requirement that the private prison contractor indemnify and hold harmless the state, its officers, agents and employees and any local governmental entity in the state with jurisdiction over the place at which the private prison facility is located or that owns the private prison facility, and shall reimburse the state or local governmental entity for costs incurred defending the state or local governmental entity or any of its officers, agents or employees against all claims including the following:

(i) Any claims or losses for services rendered by the contractor, its officers, agents or employees, performing or supplying services in connection with the performance of the contract;

(ii) Any failure of the contractor, its officers, agents or employees to adhere to the laws, rules, regulations or terms agreed to in the contract;

(iii) Any constitutional, federal, state or civil rights claim brought against the governmental entity related to the facility operated and managed by the contractor;

(iv) Any claims, losses, demands or causes of action arising out of the activities in this state of the contractor, its officers, agents or employees;

(v) Any attorney's fees or court costs arising from any habeas corpus actions or other prisoner suits that may arise from any event that occurred at the facility or was a result of such an event, or arise over the conditions, management or operation of the facility, which fees and costs shall include, but not be limited to, attorney's fees for the governmental entity's representation and for any court-appointed representation of any prisoner.

(o) A clear statement that provisions set forth within this chapter do not affect any immunity or defense that the state and its officers and employees or a contracting authority and its officers and employees may be entitled to under another section of the Idaho Code, including, but not limited to chapter 9, title 6, Idaho Code;

(p) A clear statement that no immunity from liability granted to the state, and no immunity from liability granted to political subdivisions pursuant to chapter 9, title 6, Idaho Code, shall extend to the private prison contractor or any of the private prison contractor's employees;

(q) A requirement that the private prison contractor and its personnel comply with the provisions of this chapter, all laws of the state of Idaho, and all ordinances, policies and procedures of the contracting authority;

(r) A requirement that any ambiguities in the contract shall be construed against the private prison contractor and in favor of the contracting authority.

(3) Contracts awarded under the provisions of this section shall, at a minimum, comply with the following:

(a) Provide for internal and perimeter security to protect the public, employees and prisoners;

(b) Provide that the private prison contractor shall not benefit financially from the labor of prisoners nor shall any prisoner ever be placed in a position of authority over another prisoner. Any profits realized from the operation of a prison enterprise program shall revert to the contracting authority;

(c) Provide that the private prison contractor shall impose discipline on prisoners only in accordance with applicable rules, policies and procedures satisfying constitutional minimums, state and federal laws and applicable court orders;

(d) Require that the private prison contractor provide proper food, clothing, housing and medical care as provided for in the contract. The governmental entity contracting with the private prison contractor shall not be responsible for any costs associated with the medical care of prisoners in the custody of the private prison contractor.

(4) The contracting authority or its designee, as provided in the contract, shall monitor the performance of the private prison contractor. Included in the powers and responsibilities of the contracting authority or its designee, when acting as the contract monitor of the private prison contract are:

(a) A determination if the requirements of the contract are being satisfactorily performed;

(b) A determination whether the private prison contractor and its personnel are complying with the provisions of this chapter, all laws of the state of Idaho and any ordinances or written policies and procedures of the county or city governing the private prison facility;

(c) A determination if applicable ordinances, written policies and procedures of the contracting authority are being followed by the private prison contractor and its personnel;

(d) A determination whether the facility is being operated in a manner which adequately safeguards and protects the safety of the public;

(e) Approval of all prisoner releases on furlough or work release;

(f) The enactment of ordinances or the adoption of written policies or procedures interpreting or making specific application of the provisions of this chapter. [I.C., § 20-805, as added by 1998, ch. 360, § 1, p. 1123; am. 2000, ch. 272, § 10, p. 786; am. 2001, ch. 335, § 4, p. 1177.]

Compiler's notes. Sections 9 and 11 of S.L. 2000, ch. 272 are compiled as §§ 18-6110 and 20-807, respectively.

Section 14 of S.L. 2000, ch. 272 declared an

emergency. Approved April 12, 2000.

Sec. to sec. ref. This section is referred to in §§ 20-806 and 20-808.

20-806. Private prison facilities — Requirements — Licensing. —

A private prison contractor that has contracted for the location or operation of a private prison facility within a county or a city of this state shall comply with the following requirements:

(1) An individual, corporation, partnership, association, or other private organization or entity may not operate a private prison facility in this state unless licensed by the department of correction. The board of correction shall have the power and it shall be its duty to promulgate rules necessary to implement and enforce standards for the licensing and operation of

private prison facilities as set forth pursuant to this chapter. Applications for licenses shall be made on forms provided by the department of correction and accompanied by the required license fee. Licenses for the operation of private prisons shall be nontransferable. A license may be revoked if the facility fails to meet the standards and provisions of this chapter. All final decisions by the board shall be subject to review pursuant to the provisions and procedures of the administrative procedure act, chapter 52, title 67, Idaho Code;

(2) The facility shall meet correctional standards satisfying constitutional minimums, state and federal laws and applicable court orders;

(3) If the private prison facility is located on land owned by the county or the city or other publicly owned land which is not subject to real property taxes, the county or the city, if the facility is located within the limits of the city, may require the private prison contractor to pay fees to the county or the city in lieu of property taxes, as compensation for the costs to the county or the city of regulating, monitoring and providing services to the facility;

(4) The facility must provide internal and perimeter security to protect the public, employees and prisoners;

(5) The private prison contractor shall impose discipline on prisoners only as permitted by correctional standards satisfying constitutional minimums, state and federal laws, and applicable court orders;

(6) The private prison contractor shall provide prisoners with proper food, clothing, housing and medical care in accordance with constitutional minimums, state and federal laws, and applicable court orders. The private prison contractor shall require that anyone providing professional services to prisoners shall be licensed as provided by the state of Idaho if the professional would be required to be licensed in the state of Idaho to provide services to the general public;

(7) The private prison contractor shall allow access to the facility at all times and cooperate with all state and local authorities and their designees in the performance of their duties pursuant to section 20-805(4), Idaho Code, and section 20-808, Idaho Code. [I.C., § 20-806, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 5, p. 1177.]

20-807. Out-of-state prisoners. — (1) A board of county commissioners may authorize a private prison contractor operating a private prison facility within the county and the governing body of a city may authorize a private prison contractor operating a private prison facility within the city to house specific minimum to medium security prisoners convicted of offenses committed against the laws of a governmental entity other than the state of Idaho or its political subdivisions pursuant to contract with the private prison contractor and subject to the review and approval of the prisoners by the department of correction. Provided however, that in no event shall a board of county commissioners or the governing body of a city authorize, nor shall the department of correction approve, housing of any maximum or close custody prisoners, inmates imprisoned for sexual offenses or prisoners with a history or record of institutional violence involving the use of a deadly weapon, a history or record of committing any act of an

assaultive nature that would qualify as a felony under the laws of the state of Idaho against any prisoner, employee or visitor while confined, or a history or record of escape or attempted escape from secure custody.

(2) Out-of-state prisoners may be housed in a private prison facility only if the following requirements are met:

(a) The custody level capacity and availability in the private prison facility is adequate to house the prisoners;

(b) The private prison contractor and the board of county commissioners or the governing body of the city, in cooperation with state and local law enforcement agencies, and other appropriate governmental entities and agencies, have developed a written plan explaining the procedure to be used to coordinate law enforcement and other necessary activities in response to any riot, rebellion, escape or other emergency situation occurring in or on the grounds of, or otherwise in connection with, the facility;

(c) The private prison facility meets standards for the care, custody, treatment and control of prisoners which comply with constitutional minimums, state and federal laws and applicable court orders and any additional standards required by the county or the city;

(d) Each prisoner to be paroled or released from custody must be transported and released by the private prison contractor or its agent in the sending governmental entity's jurisdiction;

(e) Before transferring the prisoner to Idaho, the private prison contractor shall obtain prior approval of the department of correction pursuant to the provisions of this chapter. Prior to housing any proposed prisoner in the private prison facility, all records in the possession of, or available to, the sending entity including, but not limited to, classification, medical information, conduct and confinement history of the prisoner shall be provided to the department of correction for review and the department shall have the authority to approve or reject housing of the prisoner based on standards as set forth pursuant to this chapter. Provided however, that in lieu of providing medical information of a prisoner, a sending entity may elect to certify, by a physician licensed in this state and employed by, or under contract with, the private prison facility, that the prisoner under consideration for placement in the facility has been tested, and has not tested positive, for the presence of HIV antibodies or antigens, hepatitis B virus, hepatitis C virus and tuberculosis;

(f) The sending governmental entity will not transfer and the private prison contractor will not accept a prisoner who has a history or record of institutional violence involving the use of a deadly weapon, a history or record of committing any act of an assaultive nature that would qualify as a felony under the laws of the state of Idaho against any prisoner, employee or visitor while confined or a history or record of escape or attempted escape from secure custody;

(g) The private prison contractor will determine the prisoner's custody level in order to ensure that the custody level assignments for the facility as a whole are compatible with the construction security level availability in the facility. If it is determined by the county or the city or the private

prison contractor that the prisoner poses a substantial risk to the community, prison population or staff or should be classified as maximum security or close custody, the prisoner will be returned to the sending governmental entity.

(3) Neither this section nor any other provision of this chapter shall be construed to authorize the release of an out-of-state prisoner confined in a private prison facility on work release, furlough or other release from the facility except as provided in any contract authorized in this chapter or as provided by county or city ordinance.

(4) The provisions of this section shall not be construed as a limitation upon the authority of the state of Idaho, a county or a city of this state to incarcerate, detain or place a person convicted of an offense committed against the laws of the United States, a territory of the United States, another state or a political subdivision thereof in a correctional facility, county jail or other governmental detention facility in this state pursuant to the laws of the United States, the state of Idaho or other applicable law. [I.C., § 20-807, as added by 1998, ch. 360, § 1, p. 1123; am. 2000, ch. 272, § 11, p. 786; am. 2001, ch. 335, § 6, p. 1177.]

Compiler's notes. Section 10 of S.L. 2000, ch. 272 is compiled as § 20-805.

Section 14 of S.L. 2000, ch. 272 declared an emergency. Approved April 12, 2000.

20-808. Monitoring private prisons. — In addition to and without limiting the authority provided in this chapter or by contract entered into pursuant to section 20-805, Idaho Code, or as provided by other applicable law, the board of county commissioners, the county sheriff, the prosecuting attorney or the authorized agents and employees of a county in which a private prison facility is located and the governing board of a city, the city attorney, law enforcement personnel of the city and other authorized agents and employees of the city in which a private prison facility is located, shall be authorized to monitor the facility and to enter the facility and the grounds thereof for the following purposes:

(1) To determine if the private prison contractor, its personnel and the private prison facility are in compliance with the provisions of this chapter, all laws of the state of Idaho and any ordinances or written policies and procedures of the county or city governing the private prison facility;

(2) To investigate any criminal conduct which has occurred, is occurring or is alleged to have occurred in or on the grounds of, or otherwise in connection with, the facility;

(3) To determine whether the facility is being operated in a manner which adequately safeguards and protects the safety of the public;

(4) To review prisoner security or custody classifications to determine whether any classifications need to be revised. [I.C., § 20-808, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 7, p. 1177.]

Sec. to sec. ref. This section is referred to in § 20-806.

20-809. Riot, rebellion, escape, crime or emergency situation — Notice — Reimbursement for costs. — (1) The private prison contractor, its officers, guards, employees, and agents shall immediately notify the county sheriff and, if the facility is located within the limits of a city, the city law enforcement agency, along with any other law enforcement or other governmental entities, agencies or personnel which the county or the city may require to be informed, of any riot, rebellion, escape, crime or other emergency situation occurring inside or outside the facility.

(2) In the event of an escape by a prisoner from a private prison facility to which this chapter applies, the private prison contractor must contact the county sheriff and, if the facility is located within the limits of a city, the city law enforcement agency, and any other governmental entities or agencies which the county or city may require to be informed, upon receiving knowledge of the escape, but may attempt to apprehend the prisoner while the search or pursuit is on the private prison contractor's private property. In the event that the escaping prisoner flees from the private prison contractor's private property, the sheriff of the county, in cooperation with city law enforcement as appropriate, shall organize and have jurisdiction over the pursuit and apprehension of the prisoner.

(3) A private prison contractor shall reimburse Idaho governmental entities for costs incurred by the entities in responding to any riot, rebellion, escape, crime or other emergency situation occurring in or on the grounds of, or otherwise in connection with, the facility. The private prison contractor shall also reimburse Idaho governmental entities for costs incurred by the entities with respect to the investigation, prosecution, detention or appellate litigation, without regard to whether conviction is obtained, of a prisoner charged with a crime resulting from a riot, rebellion, escape or other criminal conduct.

(4) If a prisoner commits a criminal offense while confined in a private prison facility in this state and is convicted of or pleads guilty to that offense and is sentenced to a term of confinement for that offense but is not sentenced to death for that offense, the prisoner shall be returned to the out-of-state jurisdiction or the out-of-state jurisdiction's private contractor for confinement. The prisoner shall not begin serving the term of confinement imposed for the offense committed while confined in this state until such time as the prisoner is released from the custody of the out-of-state jurisdiction. The private prison contractor or its agent will transport the prisoner, or cause the prisoner to be transported, to the out-of-state jurisdiction. If the prisoner is confined in this state in a facility operated by, or pursuant to a state contract with, the department of correction for any period of time prior to transfer back to the out-of-state jurisdiction, the private contractor will be financially responsible for reimbursing the department at the per diem cost of confinement for the duration of that incarceration. Notwithstanding the provisions of this subsection, any sentence imposed against a prisoner by a court in the state of Idaho may be imposed to run concurrently with any sentence already being served by the prisoner. [I.C., § 20-809, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 8, p. 1177.]

Compiler's notes. Section 9 of S.L. 2001, ch. 335 is compiled as § 20-812.

Sec. to sec. ref. This section is referred to in §§ 18-2507, 20-805.

20-810, 20-811. Crimes committed in a private prison facility — Other code references. [Repealed.]

Compiler's notes. Former § 20-810, which comprised I.C., § 20-810, as added by 1998, ch. 360, § 1, p. 1123, was repealed by S.L. 2000, ch. 272, § 12, effective April 12, 2000.

Former § 20-811, which comprised I.C., § 20-811, as added by 1998, ch. 360, § 1, p. 1123, was repealed by S.L. 2000, ch. 272, § 12, effective July 1, 2000.

20-812. Enforcement — Available remedies — Civil penalty. —

(1) The county prosecuting attorney shall have authority to enforce the provisions of this chapter, and any county ordinances enacted, or written policies or procedures adopted by the county with respect to the operation of a private prison facility in the county, or any contract entered into between a board of county commissioners and a private prison contractor by civil action and may seek all available civil remedies including injunction. If the prosecuting attorney prevails in the action, the private prison contractor shall be liable to the county for attorney's fees and costs of suit. The action shall be brought in the district court of the county in which the private prison facility is located or is proposed to be located.

(2) The city attorney shall have authority to enforce the provisions of this chapter, and any city ordinances enacted or written policies or procedures adopted by the governing body of the city with respect to the operation of a private prison facility within the city, or any contract entered into between the governing body of a city and a private prison contractor by civil action and he may seek all available civil remedies including injunction. If the city attorney prevails in the action, the private prison contractor shall be liable for attorney's fees and costs of suit. The action shall be brought in the district court of the county in which the private prison facility is located or is proposed to be located.

(3) In addition to any other remedies, a private prison contractor constructing, renovating or operating a private prison facility in this state in violation of the provisions of this chapter, or any ordinances enacted or written policies or procedures adopted by a county or city governing the construction, renovation or operation of a private prison facility, or a contract entered into pursuant to this chapter shall be subject to a civil penalty in an amount not to exceed five thousand dollars (\$5,000) for each separate violation or for each day of a continuing violation. [I.C., § 20-812, as added by 1998, ch. 360, § 1, p. 1123; am. 2001, ch. 335, § 9, p. 1177.]

Compiler's notes. Sections 8 and 10 of S.L. 2001, ch. 335 are compiled as §§ 20-809 and 6-904B, respectively.

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